

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 08-13555-scc
4 Adv. Case No. 13-01676-scc
5 - - - - - x
6 In the Matter of:
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8 LEHMAN BROTHERS HOLDINGS INC.,
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10 Debtor.
11 - - - - - x
12 LEHMAN BROTHERS HOLDINGS INC. et al,
13 Plaintiff,
14 v.
15 CREDIT SUISSE AG et al,
16 Defendants.
17 - - - - - x
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1 United States Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004
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5 January 10, 2018
6 10:43 AM
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21 B E F O R E :

22 HON SHELLEY C. CHAPMAN

23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: SHEA H.

1 HEARING re RMBS Claims Estimation Trial

2

3 HEARING re Adversary Proceeding 13-01676-scc Lehman Brothers

4 Holdings Inc. et al v. Credit Suisse AG et al Conference

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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16 BY: BENJAMIN P. MCCALLEN

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18 KARL D. SNOW, Witness

19

20 HON. ROBERT S. SMITH, Witness

21

22 ALSO PRESENT TELEPHONICALLY:

23 KYLE BURNS

24 AMANDA DARWIN

25

1 P R O C E E D I N G S

2 THE COURT: Please, have a seat. Good morning,
3 everyone. How are you?

4 DR. SNOW: Just fine, thank you.

5 THE COURT: Welcome back.

6 MAN: Good morning, Your Honor.

7 THE COURT: Ready? We're going to go for a
8 segment here, and then I'm going to have to take a five-
9 minute break to do something on the record in -- you know, I
10 run two courtrooms at once; what can I say? -- in the other
11 courtroom. And then we'll come back. All right? So, when
12 we get -- I'll let you know when we're -- when they're
13 getting ready, and we'll -- I'll ask you to stop at an
14 appropriate stopping point. Okay? Okay.

15 DIRECT EXAMINATION OF DR. KARL N. SNOW

16 BY MS. BLACK:

17 Q Good morning, Dr. Snow.

18 A Good morning.

19 Q Welcome back. Can we please have TRDX285? Dr. Snow, I
20 believe yesterday you explained that, in your supplemental
21 report, you calculated the interest that the Plan
22 Administrator says is impermissibly included in your
23 purchase prices, right?

24 A Well, I took the amount of accrued unpaid interest that
25 was in the liquidated loans before the application of

1 liquidation proceeds, as well as the accrued unpaid interest
2 in the non-liquidated loans, and broke them out into various
3 categories.

4 Q And, just so we are all on the same page, because the
5 term "interest" can refer to a number of different things,
6 to the extent your calculated purchase prices include
7 interest, what is the nature of such interest?

8 A Again, it is interest that, by the time of liquidation,
9 or as of April 2017 for the non-liquidated loans, had -- you
10 know, was not paid by the borrower, what was -- but was
11 supposed to have been paid.

12 Q So, again, we are talking about interest that the
13 homeowner, the borrower, was obligated to pay as part of his
14 or her monthly mortgage payments and did not pay?

15 A That is correct.

16 Q Now, you mentioned that, in your supplemental report,
17 you broke out the interest that the plan administrator
18 claims is impermissibly included in your purchase prices
19 into various categories. And I would like you to walk us
20 through those categories. So, let's start with TRDX311,
21 please. Can you please walk us through what we see on this
22 page?

23 A Yes. Unless the Court would like more detail about
24 specific numbers, I'm just going to describe the categories.

25 THE COURT: Whatever Ms. Black asks, I'll listen

1 to.

2 DR. SNOW: Okay.

3 THE COURT: Okay?

4 DR. SNOW: Okay.

5 A So, for the non-liquidated loans -- and this was broken
6 out in my affirmative report -- the unpaid and advanced
7 interest was broken out into interest that had not been paid
8 by the borrower and interest that had been advanced by the
9 servicer but not reimbursed by the trustees. I then took
10 those amounts and broke them out into subcategories:
11 amounts of interest that had accrued prepetition versus
12 post-petition, and then amounts that had accrued pre-
13 rejection and post-rejection.

14 Now, for the liquidated loans, I've done a similar
15 exercise. But I want to emphasize this is the amount of
16 unpaid and advanced interest before the application of any
17 liquidation proceeds. So, this is what was unpaid and
18 accrued at the time the loan liquidated. And, again, I've
19 broken them into what was unpaid by the borrower and not
20 advanced by the servicer, and then what was advanced by the
21 servicer but not reimbursed by the trustee, and then the
22 temporal breakdowns of pre- and post-petition, and then pre-
23 rejection and post-rejection.

24 Q And what is the significance of the distinction that
25 you're drawing between interest that is borrower unpaid and

1 interest that the servicer advanced?

2 A Well, the interest that the servicer advanced sometimes
3 is viewed as a fee. I'm not taking any particular stand on
4 this. I'm just, again, breaking it out for -- if the Court
5 wished to make that distinction. So, it's been put into
6 those two categories.

7 Q And, if you remember yesterday, from the slide that had
8 three buckets, or the three building blocks that constitute
9 a purchase price, where would the servicer-advanced interest
10 fall into, as opposed to the borrower unpaid interest?

11 A Okay. So, if we think of the three buckets, the unpaid
12 principal balance, accrued unpaid interest, and then
13 servicer advances and fees, then the servicer-advanced
14 interest would be in the last bucket. So, it would be the -
15 - one of the first items to be repaid with liquidation
16 proceeds.

17 Q Thank you. Now let's have TRDX312, please. Dr. Snow,
18 can you please walk us through what we see on this slide?

19 A Yes. So, now I've taken the liquidated loans and broken
20 them into two different categories. Liquidated loans, where
21 the realized loss at the time of liquidation is less than
22 the unpaid principal balance. So, this would indicate that,
23 for these loans, the liquidation proceeds were sufficient to
24 retire the servicer advances and the accrued unpaid
25 interest, and then retire some of the unpaid principal

1 balance.

2 And then the other category being the opposite,
3 those with realized loss greater than the unpaid principal
4 balance at liquidation. This would mean that the
5 liquidation proceeds were not sufficient to completely
6 retire the servicing advances and/or the interest -- accrued
7 unpaid interest.

8 So, I then made that breakout. I then calculated
9 the pre- and post-petition and the pre- and post-rejection
10 interest for those categories: again, what was unpaid by
11 the borrower, what was not reimbursed to the servicer. And
12 you can see that the totals will total up to 1.8 billion.
13 And that's the same total we had on the previous page for
14 the liquidated loans.

15 And, again, this is obviously before the
16 application of liquidated proceeds, liquidation proceeds,
17 because the total of the 1.4 billion, that is being retired
18 via the liquidation proceeds for these loans and is not
19 included in any of the purchase price calculations that I've
20 made for those loans.

21 THE COURT: Can I ask a clarifying question? You
22 -- I may -- might have missed it. But what date is being
23 used for rejection?

24 DR. SNOW: My record --

25 THE COURT: You know, presumably you were supplied

1 with a date.

2 DR. SNOW: Yes, I was supplied with a date. It's
3 in the report. It's the -- essentially the approval of the
4 bankruptcy.

5 THE COURT: The confirmation of the plan?

6 DR. SNOW: The -- I'm sorry, the confirmation of
7 the bankruptcy, yes.

8 THE COURT: Confirmation of the plan?

9 DR. SNOW: Yes, thank you.

10 THE COURT: Okay. The effective date of the plan?

11 DR. SNOW: Yeah.

12 MS. BLACK: Yes.

13 MR. SHUSTER: I'm not sure if it's one or the
14 other. But it's definitely --

15 MS. BLACK: I can give you the date.

16 THE COURT: Yes?

17 MS. BLACK: March 6, 2012, which is the effective
18 date of the --

19 THE COURT: Okay, the effective date of the plan,
20 okay.

21 DR. SNOW: I knew it was 2012; I just couldn't
22 remember the exact month.

23 THE COURT: Right. Okay. So, you've now all
24 learned a little of bankruptcy, so.

25 Q Dr. Snow, looking at this slide, do I understand it

1 correctly that, for the majority of the 60,305 liquidated
2 loans that were the subject of your purchase price
3 calculation, that, for the majority of such loans, the
4 purchase price does not include any interest, according to
5 your calculations?

6 MR. MCCALLEN: Objection. Leading, Your Honor.

7 THE COURT: Yeah, why don't you rephrase?

8 Q Dr. Snow, can you explain to us the distribution of the
9 -- what you just explained, liquidated loans, where the
10 purchase price does not include interest versus liquidated
11 loans where the purchase price does include some component
12 of interest?

13 A Yes. So, for the loans where the realized loss is less
14 than the UPB -- that's the majority, that's nearly 39,000 of
15 the loans -- there was 1.4 billion, at the time of
16 liquidation, in accrued unpaid interest. And, again, it's -
17 - I've broken it out into the various categories. But the
18 liquidation proceeds were sufficient to cover that amount
19 for all of those loans.

20 For the 21,000-plus --

21 THE COURT: Before you more on, though --

22 DR. SNOW: Sure.

23 THE COURT: So, the liquidation proceeds, though,
24 were applied to the number that's reflected on this chart
25 that includes post-rejection unpaid and advanced interest?

1 DR. SNOW: That is correct.

2 THE COURT: Okay. Thank you.

3 DR. SNOW: To the extent that pre- or post-
4 rejection or pre- or post-petition interest was in a
5 particular loan, then --

6 THE COURT: It was applied in that way?

7 DR. SNOW: It was applied in that way.

8 THE COURT: Thank you. Okay.

9 DR. SNOW: But you can see the amounts that are
10 being applied in the breakdown.

11 THE COURT: Yeah. Yes, thank you.

12 Q Thank you. Moving on to the last slide, TRDX313,
13 please? Dr. Snow, can you walk us through what we see on
14 this slide?

15 A Yes. So, this is just a summary of the previous two
16 that, for the liquidated loans, there is no interest
17 included in the purchase price post-liquidation --
18 application of post-liquidation proceeds. And then, for the
19 loans where the realized loss is greater than the unpaid
20 principal balance, effectively, there is 452 million, of
21 which 188 million was paid off via liquidation proceeds.
22 So, those loans contain \$236 million in unpaid and accrued
23 interest in their purchase price.

24 Q So, out of the \$1.85 billion in interest on liquidated
25 loans that the plan administrator claims are impermissibly

1 included in your calculations, how much of it is interest
2 that is embedded in the purchase price?

3 A Only 188 million of it. Basically, 1 -- roughly 1.6
4 billion is being covered by the liquidation proceeds.

5 Q I think you might have inverted the numbers.

6 A Okay.

7 MR. MCCALLEN: Objection, Your Honor.

8 THE COURT: Yes, Mr. McCallen?

9 MR. MCCALLEN: So, twofold objection to this.
10 First, it's -- this particular opinion here is not something
11 I believe was articulated in his report. But, more
12 significantly, this is a legal argument about what
13 constitutes interest and what doesn't.

14 THE COURT: Absolutely.

15 MR. MCCALLEN: We have no objection to Mr. -- to
16 Dr. Snow quantifying these numbers and saying them.

17 THE COURT: Right.

18 MR. MCCALLEN: But, to the extent he's trying to
19 describe what is interest, for purposes of the relief we're
20 seeking --

21 THE COURT: That's -- I'll decide that.

22 MR. MCCALLEN: Okay. Thank you, Your Honor.

23 THE COURT: So, I'm just listening to the -- Dr.
24 Snow explaining where the numbers fall.

25 DR. SNOW: Okay.

1 MR. MCCALLEN: Thank you, Your Honor.

2 THE COURT: I --

3 DR. SNOW: And, Your Honor, may I say one thing?

4 THE COURT: Sure.

5 DR. SNOW: The 263.55 number, that is in my
6 supplemental report.

7 THE COURT: Okay. Yes, I didn't -- that --

8 DR. SNOW: Yeah.

9 THE COURT: I didn't respond to that first
10 argument.

11 DR. SNOW: Yeah.

12 THE COURT: Because I think this --

13 MS. BLACK: I was just going to point that out.

14 THE COURT: Yes. Yeah. I'm good on that. Okay.
15 Let's keep going.

16 Q In your supplemental report, you cite to the realized
17 loss definition and the waterfall provision therein, by
18 which liquidation proceeds are applied first to interest
19 before they are applied to retire principal. Is there any
20 significance to this? That is, does it matter in which
21 order they are applied?

22 A Oh, it does, because it determines who gets repaid and
23 who receives what via the waterfall, in the -- you know, for
24 the trust, right? That's the reason that, in the realized
25 loss, it is stated, first, the servicer, because they have

1 the -- in a sense, the IOU; they're at the top. Then
2 interest, because that affects, generally speaking, all
3 investors in a somewhat similar manner. And then the
4 principal, because that affects different investors
5 differently.

6 MS. BLACK: I believe I have, at this point,
7 concluded by direct examination.

8 THE COURT: Okay. Let me do this, finish making a
9 note here. Why don't I take a moment to check with the
10 other folks? And this would be a perfect time for me to
11 finish up with them. And then we can start with the cross-
12 examination.

13 MR. SHUSTER: That'd be great, Your Honor.

14 THE COURT: All right? So, why don't we just take
15 a 10-minute break, and I'll see if I can be done with them
16 during that 10-minute break? All right? Thank you.

17 MR. SHUSTER: Thank you.

18 (Recess)

19 THE COURT: Okay. Please, have a seat. Yes.
20 Okay. Okay. All right. All right. Shall we begin?

21 MR. MCCALLEN: Yes. Thank you, Your Honor.

22 CROSS-EXAMINATION OF DR. KARL N. SNOW

23 BY MR. MCCALLEN:

24 Q Good morning, Dr. Snow.

25 A Good morning.

1 Q And, again, as at your deposition, I'll endeavor to
2 call you Dr. Snow. But, if I call you Mr. Snow, my
3 apologies in advance.

4 A Again, I'm indifferent.

5 Q Dr. Snow, could you please turn to Tab 5 in the binder
6 that's been placed in front of you?

7 A Tab 5, which would be PA Exhibit 052?

8 Q That's correct.

9 A Okay.

10 Q Now, this is the document that you talked about
11 yesterday. It's a different exhibit number. But this one
12 in particular is -- do you recognize this document?

13 A I do.

14 Q Okay. This was Exhibit 2 to your opening report,
15 correct?

16 A Correct.

17 Q Okay. And this document here that's up here, this is
18 actually an excerpt of that. It just has certain of the
19 loans. The entire document was quite big.

20 A So, can I just focus on the excerpt, or the -- do you
21 want me to focus on the document?

22 Q Let's focus on this document. I'm going to show you,
23 though, some specific lines.

24 A Okay.

25 Q We'll talk about those.

1 A Sure.

2 Q But, just to make sure that we're on the same page,
3 this is an excerpt. The complete version, Exhibit 2,
4 contains the purchase price components for each liquidated
5 and non-liquidated loan that the Trustees are seeking
6 recovery for in this case; that's correct?

7 A Per the calculations. I mean, when you say "the
8 components," it does -- the specific components for the non-
9 liquidated loans, the realized loss for the liquidated
10 loans.

11 Q Correct. And, just to look on your -- on the sheet
12 itself, if you look in the middle, above Columns F, G, H, I,
13 and J, it says, "Purchase price components for non-
14 liquidated loans," right?

15 A Yes. Yeah.

16 Q And then, a little further to the right, above Column
17 K, you see that's the purchase price components for the
18 liquidated loans.

19 A Correct.

20 Q Okay. Now, let's take a look at the very first row,
21 Row 5, and that's the loan number ending in 4727. Do you
22 see that?

23 A Yes.

24 Q And, if you look one column over, there is a column
25 called "Deal." And that lists ARC2002-BC10 for this loan,

1 correct?

2 A Correct.

3 Q And that refers to the trust or securitization that
4 this loan is in, correct?

5 A That is correct.

6 Q And this loan is identified as a liquidated loan,
7 correct?

8 A Correct.

9 Q And, just to make sure we're on the same page, a
10 liquidated loan is one where the underlying property has
11 been foreclosed upon, and a loss has been realized for that
12 loan, correct?

13 A Correct.

14 Q And one column over, Column E, the liquidation date
15 represents the date when the loss is realized and is no
16 longer being accounted for in terms of the loans underlying
17 the securitization, correct?

18 A That is correct.

19 Q Okay. Now, going forward further, Column K, this is
20 the column called Realized Loss. You see that?

21 A Yes, I do.

22 Q And, for this loan, it reports a realized loss of
23 \$90,436.60, correct?

24 A Correct.

25 Q Now, the information that appears in this Realized Loss

1 column, you took that information directly from reports by
2 the master servicers, Nationstar or Wells Fargo, when you
3 had that data, correct?

4 A That is correct.

5 Q And, when you didn't have it from Nationstar or Wells
6 Fargo, you took it from Moody's or Intex, correct?

7 A Correct.

8 Q And, when Moody's or Intex got their data, they got it
9 from the servicers, correct?

10 A That is my presumption, yes, because the data tends to
11 be consistent across these data sources.

12 Q Okay. And, in fact, let's use Nationstar as an
13 example. The data recorded by Nationstar actually contains
14 a spreadsheet with a column that's called Realized Loss,
15 correct?

16 A Yes.

17 Q So, in order to fill in Column K of Exhibit 2 for loans
18 with -- for liquidated loans, your firm just simply copied
19 the information from that Realized Loss column in the
20 servicer data into your spreadsheet, right?

21 A Well, I would say, as I mentioned in my deposition, we
22 would check to make sure that what is being reported there
23 as realized loss is what we think as being realized loss per
24 the definitions in the governing agreements. And then, yes,
25 we took that number.

1 Q But, before your "calculation of purchase price," it
2 involved taking data from a column called Realized Loss in
3 the servicer data and putting it in -- as a column in your
4 spreadsheet called Realized Loss, correct?

5 A Correct.

6 Q Now, if you take a look at Column L, you see that that
7 column is called Purchase Price. See that?

8 A Yes.

9 Q And, using this loan as an example, if you look, the
10 Realized Loss and Purchase Price are identical, correct?

11 A That is correct.

12 Q And, if you could sort of scroll down and look,
13 generally speaking, for the Realized Loss and Purchase
14 Price, for liquidated loans, the two numbers are the same,
15 right?

16 A Yes.

17 Q So, the purchase price is -- in order to calculate the
18 purchase price, you simply adopt the realized loss reported
19 by the servicers, correct?

20 A Correct.

21 Q And so, for your calculation of liquidated -- for your
22 -- strike that. For your calculation of purchase price for
23 liquidated loans, beyond taking the realized loss
24 information as reported by Nationstar, Wells Fargo, or
25 Moody's, and pasting it into your price -- Purchase Price

1 column, you didn't perform any additional calculations,
2 correct?

3 A No, I would -- and I would just add and/or Intex as
4 well.

5 Q Fair clarification. In connection with issuing your
6 report and doing your purchase price calculation, you didn't
7 speak with any of the master or primary servicers to
8 determine how the data they reported was collected, correct?

9 A No, I did not.

10 Q And, when imputing the realized loss data from
11 Nationstar, you did conduct a few spot checks, correct?

12 A With the trustee remittance reports, yes.

13 Q Correct. And the purpose of those spot checks was to
14 confirm that the realized loss figure was consistent with
15 the trustee remittance reports, right?

16 A In other words, what is being reported to investors and
17 affecting their distributions is consistent with what's
18 being reported on the monthly loan-level data
19 (indiscernible).

20 Q Correct. But your spot checks involved checking the
21 remittance reports on the one hand, and the servicer data on
22 the other, correct?

23 A Correct.

24 Q Now, you've never worked for a loan servicer, right?

25 A No, I have not.

1 Q And that would include those master servicers or
2 primary servicers?

3 A That is correct.

4 Q And, outside of cases where you've served as an expert
5 witness in litigation, you've never worked with either
6 primary or master servicers in any capacity, correct?

7 A That is correct.

8 Q And you have no experience personally interacting with
9 primary servicers or master servicers, correct?

10 A That is correct.

11 Q All right. Let's go back to Plan Administrator 52,
12 which is Tab 5 in your binder. And now I want to take a
13 look at what's Row 479. If you're looking at the hard copy,
14 it's on Page 10. But I think, if you're just going to look
15 at the screen, we can probably scroll down, and you can take
16 a look at it there.

17 Now I want to take a look at Row 479, and it's
18 with Loan Number ending in 5598. You see that?

19 A I do.

20 Q Okay. And this loan is part of Trust BNC2006-1,
21 correct?

22 A Correct.

23 Q And, if you look at Column D, this notes that this is a
24 non-liquidated loan, right?

25 A That is correct.

1 Q And I think you defined this yesterday, but a non-
2 liquidated loan is one where the property has not yet been
3 sold, at or after foreclosure, correct?

4 A Correct.

5 Q And that would include instances, potentially, where
6 the borrower is currently paying on his or her loan,
7 correct?

8 A That's what I mentioned yesterday, yes.

9 Q And now let's take a look at Column E, which is the
10 liquidation date. For this one, it's blank, and that's
11 because there has been no liquidation, correct?

12 A Hence the "non-liquidated" term.

13 Q Exactly. Now, Columns F, G, H, and I, these are filled
14 in for the non-liquidated rows -- for the non-liquidated
15 loans; I'm sorry. Now, Column F, which is Unpaid Principal
16 Balance, that's Column F, is -- that relates to principal
17 that's not been paid by the borrower, correct?

18 A Correct.

19 Q And the amount of unpaid principal balance, that also
20 comes from Nationstar or Wells Fargo, correct?

21 A Yes, components of it.

22 Q Okay. Well, in the Nationstar data, there's a field
23 called Schedule Imbalance, is there not?

24 A Correct.

25 Q And, from that field, Schedule Imbalance, you used that

1 to populate Column F in this report, right?

2 A Partially, yes.

3 Q Okay. And --

4 A But I would add we also determined what was forgiven
5 principal. And that is included in the unpaid principal
6 balance, for loans that have been modified.

7 Q Okay. And for loans where there was no forgiven
8 principal, but rather a principal was deferred, you did not
9 include that, correct?

10 A That is correct.

11 Q All right.

12 A Because that doesn't -- that's not a realized loss, at
13 that point. It gets deferred. If it's forgiven, then the
14 trust recognizes it as a loss.

15 Q Okay. And, if it's just been deferred, that's not a
16 realized loss.

17 A Correct.

18 Q Now, I want to talk a little bit about the interest
19 calculation that you have here. Looking again at PA52,
20 which is Tab 5, for the non-liquidated loans, this
21 information is recorded in Columns N and O, correct, which
22 is Interest Advanced and Accrued Interest?

23 A Yes, it is.

24 Q Okay. And the information in these columns, again,
25 comes from Nationstar, who gets it from the underlying

1 servicers, correct?

2 A Or Wells Fargo. The master servicer, yes.

3 Q But, one way or another, from the servicers, correct?

4 A Correct.

5 Q And accrued interest begins to accrue when the borrower
6 misses a payment, correct?

7 A Yes.

8 Q And interest will continue to accrue as long as the
9 loan has not been liquidated and the borrower is making
10 payments, right?

11 A I'm sorry, could you repeat the question?

12 Q Sure. Loan -- interest will continue to accrue as long
13 as the loan has not been liquidated and the borrower is
14 continuing to make payments -- I'm sorry, and the borrower
15 is not making payments, correct?

16 A That's where I was confused. Yes.

17 Q My apologies.

18 A Yes, that is correct. It will -- I mean, I think a
19 better term would be that it would accumulate, as opposed --
20 it's not compounding. It's just adding up.

21 Q Okay. But the term we use here is "accrued interest,"
22 correct?

23 A Correct. Yes.

24 Q All right. And the length of time for which interest
25 continues to accrue depends on when the borrower resumes

1 payments, if ever, correct?

2 A Yes.

3 Q All right. Now, the interest advanced is the interest
4 that's being advanced to the trust by the servicer, correct?

5 A Correct.

6 Q And the circumstances under which a servicer advances
7 interest is dependent upon the governing agreements for that
8 securitization, correct?

9 A Typically, yes, and judgment of the servicer.
10 Generally, the governing agreements allow the servicer to
11 terminate advances if they believe that the probability of
12 recovery has gone to a -- you know, effectively zero.

13 Q Right. So, when they no longer think -- the general
14 rule is, when they no longer think they have a likelihood of
15 recovering their advances, they no longer have to make those
16 advances, correct?

17 A That's correct.

18 Q Okay. Now, I want to look at the numbers on the loan
19 which is reflected in Row 479. Here, if we look under
20 Columns F-J, we see, for this loan, that the unpaid
21 principal balance is approximately \$412,000, correct?

22 A Correct.

23 Q And here, the accrued and advanced interest, which
24 appears in Column J?

25 A Yes.

1 Q And that's tallied from the columns on the right-hand
2 side of the spreadsheet, right?

3 A Correct.

4 Q That comes to approximately \$553,000, correct?

5 A Correct.

6 Q So, it's quite possible, for some of these non-
7 liquidated loans, that the interest can exceed the amount of
8 unpaid principal balance, correct?

9 A That's entirely possible. It depends upon when the
10 loan stops -- when the borrower stops making payments.

11 Q Sure. One circumstance where this might occur would be
12 when a loan foreclosure timeline is extended because of a
13 lengthy legal process, for example, and there's difficulty
14 in selling the underlying property, correct?

15 A That could be one possibility.

16 Q And, in your opening report, you calculated a purchase
17 price for all the loans that the Trustees are seeking to
18 recover for in this case, correct?

19 A Correct.

20 Q And the sum of the purchase prices for all those
21 liquidated loans is approximately \$9 billion, is that right?

22 A If -- which universe are we talking about, for the
23 76,000?

24 Q The universe would be the liquidated loans.

25 A Oh, the liquidated loans.

1 Q For which the Trustees are seeking recovery in this
2 case.

3 A Yes. Yes.

4 Q Approximately \$9 billion, is that correct?

5 A That is correct.

6 Q And the sum of the purchase prices for all non-
7 liquidated loans was approximately \$5 billion, subject to an
8 offset provided by Dr. Elsen, correct?

9 A Well, the purchase price was \$5 billion. If you take
10 that offset off the 5 billion, then you get a net purchase
11 price of a little over 2 billion.

12 Q Understood. And, at the time you issued your opening
13 report in this matter, you hadn't undertaken to calculate
14 what portion of the purchase price calculation for
15 liquidated loans consisted solely of interest, which you
16 just described for the Court a few minutes ago, correct?

17 A As of my affirmative report?

18 Q Yes.

19 A No, I had not. I had not seen any indication that that
20 was necessary, in both the expert reports that I had seen
21 and in filings.

22 Q Now, when you issued your supplemental report on
23 November 16th, 2017, you did do that calculation, though,
24 correct?

25 A That is correct.

1 Q And I just want to take a look at what this looks like.
2 So, if we could take a look at Tab 6 of your binder, this is
3 PRX2726. This was Exhibit 1 to your supplemental report,
4 correct?

5 A Correct.

6 Q And this exhibit breaks out the accrued and advanced
7 interest, prepetition and post-petition, based on the
8 September 15th, 2008, petition date, correct?

9 A That is correct.

10 Q Okay. So, let's just look at one example, so we see
11 how this works. Look at Row 10, which is the loan ending in
12 6598. And, just to clarify, this is a liquidated loan,
13 correct?

14 A Correct.

15 Q And if you go to Column N, Accrued and Advanced
16 Interest, that column lists the total amount of accrued and
17 advanced interest for this liquidated loan, correct?

18 A Correct.

19 Q And that number is \$48,970.75, correct?

20 A That is correct.

21 Q Okay. Now, if you go out to Columns R and S, that
22 accrued interest portion is broken out into prepetition and
23 post-petition, correct?

24 A Correct.

25 Q And, for this particular loan, there is approximately

1 \$41,000 of prepetition interest and approximately \$7500 of
2 post-petition interest, correct?

3 A Correct. But let's be clear: this is prior to the
4 application of liquidation proceeds.

5 Q I understand that. But --

6 A Yes. But yes, the --

7 Q The prepetition column is 41,000, correct?

8 A Yes.

9 Q And the post-petition column is approximately 7500,
10 correct?

11 A Correct, just to make sure that we're talking about the
12 same thing.

13 Q Okay. Now, if you aggregate those numbers across all
14 loans, prior to the application of liquidation proceeds --

15 A Right.

16 Q You calculate the prepetition portion of the interest
17 to be approximately 440 -- I'm sorry, to be approximately
18 \$444 million, correct?

19 A Correct.

20 Q And the amount of post-petition interest would be
21 almost \$1.7 billion, correct?

22 A Yeah, roughly 1.8, again, prior to the application of
23 liquidation proceeds.

24 Q And, collectively, it's about \$2.1 billion when you add
25 the two together; is that right?

1 A Roughly speaking, yes.

2 Q Okay. Let's now take a look at TRX2727, which is in
3 Tab 7 of your binder.

4 A Okay.

5 Q And we can move through this quickly, (indiscernible)
6 notes. It's -- this is Exhibit 2 of your supplemental
7 report. Do you recognize that?

8 A I do.

9 Q And, similarly, this breaks out the interest
10 calculation into pre- and post-rejection date, correct?

11 A That is correct. And it's similar to the spreadsheet
12 we just looked at. It's just using a different date for the
13 breakout.

14 Q Exactly. And we don't have to walk through an example,
15 because I think everybody probably understands what you're
16 doing here. But, for your aggregate calculations, the post-
17 rejection interest you calculated to be \$498.1 million,
18 correct?

19 A Correct.

20 Q Okay.

21 A At least, that's my recollection, without the exact
22 number being in front of me.

23 Q Would you like to look at your report?

24 A No, I will -- I recall that's about the right number.

25 Q Okay. Now, you were retained by counsel for the

1 Trustees to calculate the purchase price for each loan that
2 the Trustees are seeking recovery on in this case, correct?

3 A I was provided a list, yes, of approximately 76,000
4 loans.

5 Q Okay.

6 A Which I understand that they are seeking recovery on,
7 that they're making claims on.

8 Q And that list you referred to, that's Exhibit 1 to your
9 opening report?

10 A Correct -- well, it has a list of the loans, yes.

11 Q Correct. And that list, for which you were calculating
12 the purchase price, that was provided to you by counsel?

13 A Correct.

14 Q You were in no way involved in the preparation of that
15 list, correct?

16 A No, I was not.

17 Q In connection with issuing your opening report, your
18 affirmative report in this matter, you did not review any
19 loan files associated with any of the loans in that list,
20 correct?

21 A Correct.

22 Q And, for the loans for which you're calculating the
23 purchase price, you're not offering any opinion as to
24 whether any of the loans contain breaches of representations
25 and warranties, correct?

1 A No, I understand that as the subject of other expert
2 and legal discussions.

3 Q And you are also not offering an opinion about under
4 what conditions the Plan Administrator is required to
5 repurchase a loan, correct?

6 A No, I am not.

7 Q And you're also not opining about whether any of the
8 loans are actually compensable or not; you're just
9 calculating the purchase price, correct?

10 A That was my mandate, as I explain both in my report and
11 in my direct testimony.

12 Q And you're also not offering an opinion as to whether
13 any of those alleged breaches of representations and
14 warranties had a material, adverse effect on the value of
15 the loan, correct?

16 A Correct.

17 Q Now, you testified yesterday that you had served as an
18 expert in more than 20 cases, calculating purchase price
19 damages in the RMBS context. Is that correct?

20 A That is correct.

21 Q And, in those cases, you performed a calculation
22 similar to the one you performed here, correct?

23 A Yes, in -- generally speaking, yes. Sometimes the data
24 is a little bit different, but it's essentially determining
25 what are the proper components of the purchase price and

1 making those calculations.

2 Q And the calculations you did in those cases are
3 consistent with what you did here, correct?

4 A Yes, that's correct.

5 Q All right. And you relied on your experience in those
6 other cases in concluding that your calculation here was
7 appropriate, correct?

8 A Partially, yes. As I explained yesterday, though, that
9 where I started was looking at the protocol order, the
10 governing agreements, and then at filings in this matter.

11 Q Understood. Now, you've offered no alternative method
12 of calculating damages, correct? It's the method you've
13 offered, which is the purchase price calculation; that's it,
14 correct?

15 A Well, let's be clear: I'm -- I don't believe that I'm
16 offering an opinion on damages per se. I was asked to
17 calculate the purchase price, again, you know, per the
18 protocol order and the governing agreements. And that's
19 what I have done.

20 Q So, you performed a purchase price calculation, and
21 that's it, correct?

22 A Yes.

23 Q But you understand that that's going to be used as a
24 measure -- Trustees are trying to use that as a measure for
25 damages in this case, correct?

1 A I understand that, yes.

2 Q Okay. So --

3 A But there may be other -- in other words, I'm not
4 opinion on damages per se. I am opining on what are the
5 purchase prices.

6 Q Well, to the extent the Court were to determine that
7 the purchase price calculation is not an appropriate measure
8 in this case, you've offered no alternative method to
9 calculate damages in this case. Is that correct?

10 A No, I wouldn't say that's the case. I would say it
11 depends on what the Court rules. For example, in my
12 supplemental report, I have broken out the interest
13 components. And, if the Court were to find that certain
14 components of interest were not appropriate, those could be
15 removed. And that would be an alternative measure of the
16 purchase price.

17 Q Well, putting the interest issue aside, but in terms of
18 the 76,000 loans that are in this case, correct?

19 A Yes.

20 Q You've offered no calculation of damages for those
21 loans separate and apart from the purchase price calculation
22 you've performed, correct?

23 A And the interest rate breakouts, yes.

24 Q Now, one more question: the Exhibit 1, which we talked
25 about before, which was the list attached to your report?

1 A Yes.

2 Q Do you recall that? And that contained all the loans
3 for which you've provided a purchase price calculation?

4 A Yes.

5 Q When were you provided that list?

6 A That I don't recall specifically. Sometime in the
7 preparation of my affirmative report.

8 Q And when were you retained in this case?

9 A Sometime in the -- I think it was the first quarter of
10 this year. But I can't tell you the exact date I received
11 the list without going back to my records.

12 Q So, if the Court were to determine that an alleged
13 breach of representation or warranty for any given loan
14 caused only part of a loss as reported in the realized loss
15 of your data, that's not something your purchase price
16 calculation takes into account, correct?

17 A Well, first of all, I'd just like to understand: what
18 do you mean by "caused" here?

19 Q So, to the extent that the Court determined that a
20 portion of the realized loss which you report is caused --
21 was not caused by the alleged breaches of representations
22 and warranties, I'm trying to understand whether you have
23 provided a basis to calculate that in your report.

24 A Yeah, I'm not trying to be difficult, but my
25 understanding of causation is that the breach interacts with

1 various what we would call trigger events. It may be
2 macroeconomic, decline in housing prices; it may be
3 idiosyncratic in terms of, you know, a borrower losing their
4 job. All those things interact. So, saying that the breach
5 caused something or didn't is not something I quite
6 understand in terms of what you're asking.

7 Q Well, the factors you just cited, you didn't take those
8 into consideration in any way in the calculation you
9 performed, correct?

10 A That is correct. I am not offering an opinion on
11 whether there was a material and adverse, you know, impact
12 of the breach. I just calculated purchase price.

13 Q And, separate and apart from material and adverse
14 impact, the other factors you cited, such as housing prices
15 and things like that, that's not a factor in any way into
16 your calculation, correct?

17 A No, I was asked to calculate the purchase price.

18 Q I'd like to discuss now your reliance on Mr. Elsen's
19 valuations of the active loans in this case.

20 A Sure.

21 Q In your June opening report, you performed a purchase
22 price calculation for all active loans as of that time. Is
23 that right?

24 A That is correct -- well, non -- what I refer to as non-
25 liquidated loans.

1 Q Non-liquidated loans. If I refer to them as active
2 loans, you know what I'm referring to.

3 A We're talking about the same thing, yes.

4 Q And, just to make sure we're on the same page, you
5 added up the purchase price for all the active loans in the
6 case and then subtracted from that number the number
7 provided by Dr. Elsen, correct?

8 A Correct.

9 Q And Dr. Elsen estimated the current value of the non-
10 liquidated loans to be approximately \$3 billion, is that
11 correct?

12 A Correct.

13 Q Now, you had no role in Dr. Elsen's calculation of the
14 estimated value of those non-liquidated loans, correct?

15 A Correct. That was not part of my expert mandate.

16 Q Do you understand that Dr. Elsen used LoanKinetics
17 software to do that calculation?

18 A I do.

19 Q And you were asked by counsel to rely on those
20 calculations by Dr. Elsen, correct?

21 A Correct.

22 Q In connection with issuing your opening report, you
23 didn't review any of Dr. Elsen's calculations for accuracy
24 in any way, correct?

25 A No, I did not.

1 Q And you did not calculate any potential margin of error
2 around the figure provided by Dr. Elsen, correct?

3 A No, I am not.

4 Q And you did not review any materials regarding
5 LoanKinetics in connection with issuing your opening report,
6 correct?

7 A No, I did not -- well, other than I am familiar with it
8 and I reviewed, you know, the basics of what it does and Dr.
9 Elsen's background.

10 Q But, in connection with issuing your opening report in
11 this matter, you didn't review any materials regarding
12 LoanKinetics, did you?

13 A I -- what do you mean by materials concerning
14 LoanKinetics?

15 Q Any materials regarding LoanKinetics. Did you review
16 any materials regarding LoanKinetics in connection with your
17 opening report?

18 A I may have looked at their website. I'm -- I was
19 familiar with them beforehand, and that would have been the
20 extent.

21 Q Okay. Are you aware that LoanKinetics is a product
22 developed by Andrew Davidson?

23 A Yes, I am.

24 Q Referred to as ADCo sometimes?

25 A Yes.

1 Q Did you speak with anybody at Andrew Davidson in
2 connection with issuing your opening report?

3 A No. I am relying on Dr. Elsen's work.

4 Q And you have no personal experience with LoanKinetics,
5 right?

6 A No, I do not.

7 Q You've never used LoanKinetics in any other litigation?

8 A No. I am familiar with their product, but I have not
9 used it.

10 Q And you did not speak with Dr. Elsen in connection with
11 issuing your report in this case, correct?

12 A No, I did not.

13 Q You also assume that ADCo cross-validated the
14 LoanKinetics model by checking how accurately their model
15 performed against or within a sample set of loans, correct?

16 A Correct.

17 Q That's something you would assume that they would do.

18 A That is absolutely correct.

19 Q But you didn't actually look to see whether they did
20 that, so you don't know for sure whether ADCo did that,
21 correct?

22 A I don't know absolutely for sure. But given it's a
23 market-based product and in my experience as a statistician,
24 I'm virtually certain that they did.

25 Q Okay. I want to discuss now the on-hold loans.

1 A Okay.

2 MR. MCCALLEN: We're doing okay with time, Your
3 Honor?

4 THE COURT: We're doing okay.

5 MR. MCCALLEN: Okay.

6 THE COURT: I'm waiting on this other group, and
7 presumably they'll let me know when they're ready to talk to
8 me. So, keep going.

9 MR. MCCALLEN: Okay.

10 Q Now, it is your understanding that the Plan
11 Administrator set aside loans as on-hold if the loans were
12 missing a loss certification, corporate expense log,
13 servicing notes, or payment history, correct?

14 A Correct.

15 Q Now, I want to take a look at your rebuttal report,
16 which is -- it's behind Tab 3 of the binder that I gave you.

17 A Okay.

18 Q And if you look at Page 12, Paragraph 24?

19 A Page 12, Paragraph 24.

20 Q Yeah.

21 A Yes.

22 Q And you see it says, "I selected a random sample of 160
23 loans from the population of 267 on-hold liquidated loans
24 that are breaching loans, and as to which the Plan
25 Administrator claims that both of -- both a loss certificate

1 and corporate expense log are present in the loan file," do
2 you see that?

3 A I do.

4 Q Is that an accurate statement of the analysis you
5 performed?

6 A It is.

7 Q Now, in preparation for your rebuttal report, you
8 reviewed the protocol order, correct?

9 A Correct. Well, I did -- I reviewed the protocol order
10 in preparation of my affirmative report.

11 Q Okay. So, in preparation for both, you reviewed it.

12 A Yes. Yes.

13 Q But you're not offering the Court an opinion about
14 what's required or not required under the protocol order,
15 correct

16 A Correct. I'm -- I think that I've been very clear in
17 that I was asked to calculate a purchase price per the
18 relevant documents in this matter, and that's what I've
19 done.

20 Q Okay. You've also provided an opinion with respect to
21 the loans that were placed on hold, though, correct?

22 A Well, with respect to the calculation of a purchase
23 price. Whether or not those are needed for some other
24 reason is not part of my opinion.

25 Q Okay. And, in addition to reviewing the protocol, you

1 have -- but you have not spoken with Trustees' counsel or
2 Duff & Phelps about what was required pursuant to the
3 protocol, correct?

4 A Well, what do you mean by what was required, and what
5 dimensions? I have had discussions with counsel about what
6 is required via the protocol.

7 Q Okay.

8 A Are you talking about a specific aspect of it?

9 Q My question is whether, with respect to what's required
10 under the protocol for loss certificates and corporate
11 expense logs, whether you've had discussions with Trustees'
12 counsel or Duff & Phelps about what's required under the
13 protocol order.

14 A I have.

15 Q Okay. Now, you were not involved, however, in any way,
16 in the process of attempting to obtain missing loss
17 certificates or corporate expense logs for the Trustees from
18 the servicers, correct?

19 A That is correct.

20 Q I want to take a minute to talk specifically about the
21 loss certificates. Now, a loss certificate is a form that
22 details the loss associated with a loan, correct?

23 A At that particular point in time, yes.

24 Q Okay. And prior to performing the work that's
25 described in your rebuttal report, you had never seen a loss

1 certificate before, correct?

2 A That is correct. I think I've seen things akin to it.

3 A final determination recovery document but not a loss
4 certificate.

5 Q Right. You've never seen a loss certificate before you
6 did the calculation described in your rebuttal, correct?

7 A That is correct. It had not been necessary in any of
8 the other matters in which I'd worked in.

9 Q Now, loss certificates provide support or backup for
10 the realized loss figure, correct?

11 A Yes. It is a summary of certain information that is
12 going into the realized loss.

13 Q And we've already established from looking at your
14 Exhibit 2 to your opening report that the realized loss
15 number is the same as your purchase calculation for each
16 liquidated loan, correct?

17 A Correct.

18 Q Okay. I want to take a look at what's behind Tab 10.

19 A Tab 10?

20 Q This is an example of a loss certificate.

21 A Okay.

22 Q It's PA Exhibit 661. Okay. And this is an example of
23 the loss certificate for loan ending in Number 2200,
24 correct?

25 A That's what it appears to be, yes.

1 Q All right. And in terms of the information that
2 appears in the loss certificate, if you look at the bottom
3 right hand corner under where it says Total Amount Denied,
4 you see that it shows the unpaid principal balance at the
5 time of liquidation, do you see that?

6 A Yes.

7 Q And that number is -- that number is populated in this
8 -- in this loss certificate, correct?

9 A Correct.

10 Q And the next line down shows accrued interest, correct?

11 A Correct.

12 Q And that information is also available in this law
13 certificate, correct?

14 A Correct.

15 Q And a few lines down from that there's an entry for Net
16 Advances and Expenses Allowed, correct?

17 A Correct.

18 Q And further down, if you look -- you see the field
19 entitled Subtotal, that tallies up all of these individual
20 items, correct?

21 A Correct.

22 Q And if you look, you can also see the liquidation
23 proceeds. This is off to the left, correct?

24 A Correct.

25 Q And that's also reported on the loss certificates,

1 correct?

2 A Correct.

3 Q And if you look back to the right, there's a box called

4 --

5 A Well, I want to just -- I said -- I haven't reviewed
6 every single loss certificate so I can't testify to exactly
7 what's on every loss certificate. But on this particular
8 one, yes.

9 Q And, generally, in your experience, that information --

10 A Generally, in the ones I reviewed, yes.

11 Q Okay, you reviewed 160? Is that right?

12 A 154, to be precise, because six were not available.

13 Q And you found that to be a statistically significant
14 sample, correct?

15 A Yes, of the 267, yes.

16 Q Okay. So, let's take a look then -- to the right, you
17 say. And there is a box called Net Gain Loss With Interest,
18 do you see that?

19 A I do.

20 Q And so that records the net gain and loss with
21 interest, right?

22 A Yep.

23 Q And that's also generally reported on these loss
24 certificates, correct?

25 A That's my recollection.

1 Q Okay. And for this box it records specifically that
2 it's \$122,931.43, correct?

3 A Correct.

4 Q And below that you see a box called Net Gain Loss
5 Without Interest, do you see that?

6 A Yes, I do.

7 Q And that box says approximately \$101,000, correct?

8 A Correct.

9 Q Now, all of this information that is recorded here,
10 this is all useful in checking the calculation of realized
11 loss, correct?

12 A Which I did in my report and that the realized loss
13 numbers that were reported to the investors are consistent
14 with --

15 Q Right. And all of these -- these numbers we've looked
16 at here, these are all components of realized loss, right?

17 A That's correct.

18 Q And so looking at these numbers allowed you to confirm
19 that actually the numbers are what was reported by the
20 servicer, correct?

21 A Correct. And that's what... Sorry. The fact that
22 they are consistent is another reason why it's reliable to
23 rely on the realized loss numbers that are reported in terms
24 of calculating a purchase price for liquidated loans.

25 MR. MCCALLEN: Your Honor, so I move to strike

1 everything beyond the answer, correct, to that question?

2 THE COURT: Fair enough, yes.

3 Q Let's shift our discussion now to the corporate expense
4 logs. That was another document that you reviewed in
5 connection with issuing your rebuttal report, correct?

6 A Correct.

7 Q And the corporate expense log contains -- contain
8 expenses associated with servicing the loan, correct?

9 A Correct.

10 Q It's your understanding that the primary servicer
11 creates the corporate expense logs as well, correct?

12 A That is my understanding, yes.

13 Q Okay, so let's look at an example of one of those.
14 This is actually within the same document so it's -- stay
15 within Tab 10 but just turn to Page 5. And you have to turn
16 it sideways or you can look at the screen, and then you
17 don't have to turn your head for the binder.

18 A I'll look at the screen.

19 Q Okay. So just to make sure we're on the same page, if
20 you look on the bottom left here, you see there's a loan
21 number and the beginning part is redacted. Do you see that?

22 A Yes, I do.

23 Q But the final two numbers are 2200?

24 A Yes.

25 Q And that's the same loan you were just looking at for

1 the loss certificate, correct?

2 A Correct.

3 Q All right. And you understand that this shows -- that
4 this corporate expense logs shows the fee and costs
5 associated with servicing this particular loan, correct?

6 A Yes.

7 Q Okay. And now, look specifically -- you see three
8 columns over there's a column called Taxes. Do you see
9 that?

10 A I do.

11 Q And then immediately to the right of that there's a
12 column called Date Paid, right?

13 A Yeah.

14 Q And that records the date that the taxes were paid,
15 correct?

16 A Correct.

17 Q And then moving further to the right, there's a column
18 for Insurance. Do you see that?

19 A I do.

20 Q And then another column for Date Paid?

21 A Yes.

22 Q And then if you look a few more columns to the right,
23 there's one for Attorneys' Fees and Costs. Do you see that?

24 A I do.

25 Q And that information, Attorneys' Fees and Costs is also

1 populated in here, correct?

2 A That's correct.

3 Q And do you see the column that says Inspections? A
4 little further to the right.

5 A I do.

6 Q And that represents additional cost, correct, for
7 inspections?

8 A Correct.

9 Q All right. And that's recorded there as well, right?

10 A Correct.

11 Q And if you look at these collectively with the dates
12 paid, it shows you how these costs are accrued over time,
13 correct?

14 A Correct.

15 Q You can see when they were actually recorded by the
16 servicer, correct?

17 A Correct.

18 Q Collectively, all these items -- all these details that
19 we've looked at in this corporate expense log itemize costs
20 that were incurred during the foreclosure and liquidation
21 process, correct?

22 A Yes. Or at least I believe so. I mean, I don't know
23 the date of the liquidation but that's what it appears to
24 be.

25 Q Sure. And by reviewing this document you can confirm

1 the accuracy of those charges, correct?

2 A Yes.

3 Q Now, I'm going to briefly discuss the other two

4 documents that if missing, resulted in the plan

5 administrator placing loans on hold, and those were payment

6 history and servicing notes. You're familiar with that,

7 correct?

8 A Yes.

9 Q Your analysis of 160 loans did not look at either -- do

10 not look at payment history documents, correct?

11 A Correct.

12 Q So you were not offering any opinion regarding the

13 decision to put loans on hold for lack of a payment history,

14 correct?

15 A That was not part of my opinion, no.

16 Q And now turning to servicer notes, you're not an expert

17 in what information is recorded in servicer notes, right?

18 A That's correct.

19 Q And you're not offering an opinion regarding the plan

20 administrator's decision to put loans on hold for lacking

21 servicer notes, correct?

22 A Correct.

23 Q Okay. Now, yesterday and today we've looked at various

24 different spreadsheets that showed your calculations for

25 purchase price, and all that -- all those calculations were

1 done, with the exception of the interest calculation, as of
2 April 2017, correct?

3 A The interest calculations were also done as of April
4 2017.

5 Q I stand corrected. All of your calculations were done
6 as of April 2017, correct?

7 A That's correct.

8 Q And by "as of April 2017" we mean you used performance
9 data as of April 2017, correct?

10 A Right. To be consistent with the other expert reports
11 in this matter.

12 Q Okay. But as of today, there would be more recent data
13 available, right?

14 A Correct.

15 Q So, after April you had data in May?

16 A Correct.

17 Q And then June, correct? And every month up until
18 probably like, November at this point, is that right?

19 A Let's see, the November date -- it would've come out
20 December -- roughly, around Christmas, so yes. All through
21 December.

22 Q Okay. So you probably wouldn't have December data at
23 this point. But you'd have data from May through November,
24 correct?

25 A That is correct.

1 Q Now, you testified at your deposition that you intended
2 to update your calculations with subsequent performance data
3 available before today, correct?

4 A Correct.

5 Q But you didn't do that, right?

6 A Correct. I was not asked to do so by counsel.

7 Q Now, if you had looked at the more recent performance
8 data, some of the loans that previously had been non-
9 liquidated loans probably would've moved over to the
10 liquidated category, correct?

11 A Yes. Some would have.

12 Q Okay. And to the extent one of those loans paid off in
13 full, you would not include it among the loans that you're
14 doing purchase price calculation for, correct?

15 A That's correct. The purchase price calculation has to
16 be made at a particular point in time, and it can change as
17 things change going into the future.

18 Q Right. But have you updated your calculations with
19 more recent performance data and loans had liquidated
20 without a loss, you'd have had to drop those from your
21 purchase price calculation?

22 A That's correct. And there would've been loans that --
23 non-liquidated loans that may have liquidated with losses
24 that may have increased the purchase price. But all I can
25 say is the purchase prices may have been different.

1 Q Okay. In -- as a general matter, when housing prices
2 go up it's more likely that the servicer will receive more
3 consideration as part of a foreclosure, correct?

4 A Other things being equal, yes.

5 Q All things being equal, housing prices go up, you get
6 more money in foreclosure, correct?

7 A Correct.

8 Q And so, generally speaking, if housing prices are on
9 the rise, then all things being equal, it's more likely that
10 you will receive sufficient proceeds from liquidation to
11 cover unpaid principal balance than if housing prices are
12 not going up, correct?

13 A The only caveat I would say is that that will still not
14 -- I mean, other things being equal, yes. If we factor in
15 prior -- prior losses, those often are not covered with
16 liquidation proceeds.

17 Q Thank you.

18 MR. MCCALLEN: Your Honor, would this be a good
19 time for a break?

20 THE COURT: Yeah, it would be a good time for a
21 break. So, let's take a 10-minute break and then it's okay
22 to keep going today, right?

23 MR. SHUSTER: Yes.

24 THE COURT: Okay. We'll come back in ten minutes.
25 And then how much more do you think you have, Mr. McCallen?

1 MR. MCCALLEN: I think I -- less than an hour.

2 THE COURT: Okay. So then maybe that'll get us to
3 the lunchbreak. Thank you.

4 (Recess)

5 THE COURT: Have a seat. Yes.

6 Q Dr. Snow, as we were discussing earlier, you've served
7 as an expert in various other RMBS cases, right?

8 A That is correct.

9 Q And in cases outside of the RMBS context as well,
10 right?

11 A That is correct.

12 Q And you've served as an expert in doing calculations
13 such as a purchase price calculation, correct?

14 A Yes, that's right.

15 Q And you've also generally served as a damages expert,
16 too, is that correct?

17 A I wouldn't say -- well, generally in RMBS matters, yes,
18 I have served as a damages expert.

19 Q You performed calculations that were used by a court to
20 render a decision on damages, correct?

21 A Correct.

22 Q Now, whenever you are performing those calculations you
23 generally try to make sure that you check the components of
24 the calculations to make sure that they're accurate, right?

25 A Yes.

1 Q You think it's important to do that to make sure you
2 get the numbers right, correct?

3 A Well, I think it's important to make sure that what's
4 being reported at the loan level, line master servicer, is
5 the same as what's being reported by the trustee
6 administrator in terms of the remittance reports because
7 that's what's determining the distributions to the
8 investors.

9 Q Fair. But as a general matter, in terms of the
10 calculations you perform, you endeavor as an expert in these
11 areas to make sure you check the numbers to get it right,
12 correct?

13 A Yes.

14 Q Because that's important, correct?

15 A Correct.

16 Q All right. I'd like to turn to...

17 MR. MCCALLEN: And, by the way, Your Honor, I was
18 able to significantly shorten this over the break.

19 THE COURT: Okay, great.

20 MR. MCCALLEN: So I think we just have a few more
21 minutes.

22 THE COURT: Sure.

23 MR. MCCALLEN: But that involves me moving around
24 a little bit.

25 THE COURT: Okay.

1 Q Let's now take a look at Tab 4 behind -- in your
2 binder, and behind Tab 4 is (indiscernible) 51, which is
3 your supplemental report.

4 A That's correct.

5 Q Now, I want to focus on Footnote 35. In Footnote 35
6 you cite to a series of documents and one of them there is
7 the letter from Mr. Cosenza to Mr. Shuster and an Exhibit A,
8 which is attached to that letter.

9 A Correct.

10 Q Do you see that? Now, you might have to sort of switch
11 between your two documents but if you look behind Tab 11 in
12 your binder you'll see a copy of that document.

13 A Okay.

14 Q Now, in Footnote 37 of your supplemental expert report
15 you say, "I understand that the plan administrator included
16 a footnote in Exhibits A indicating that the plan
17 administrator's calculating accounts for the remaining value
18 of the performing collateral." Do you see that?

19 A I do.

20 Q Now, turning back to -- and I'm sorry, one more. And
21 then Footnote 38 you quote Footnote 2 from the letter from
22 Mr. Cosenza or the attachment to the letter from Mr.
23 Cosenza. And you say, "I understand the plan administrator
24 included a footnote in Exhibits A indicating that the plan
25 administrator has determined that certain instances, the

1 harm caused by the trust's servicing failures warrants an
2 adjustment to the allowed claim amount. In those instances
3 the plan administrator has applied the adjustment without
4 waiving its right to argue that the servicing failures were
5 the direct and proximate cause of losses to the trust." Do
6 you see that?

7 A I do see that.

8 Q Now, you reviewed the letter from Mr. Cosenza in the
9 attached exhibit in connection with your supplemental
10 report, correct?

11 A Correct.

12 Q Now, I just want to refer you to a couple of footnotes
13 which you didn't cite in your report.

14 A Okay.

15 Q The first is -- it's in -- if you look at Exhibit A,
16 the letter from Mr. Cosenza, it would be Row 8. It says,
17 "The plan administrator's response hereby incorporates an
18 express reservation of all rights with respect to any and
19 all defenses, offsets, claims, indemnities, and all other
20 arguments that may exist with respect to the review files,
21 including any one or more of the claims submitted in review
22 files has not been made against the appropriate party, and
23 that the RMBS claims submitted on loans that have been
24 liquidated are not valid claims." Do you see that?

25 A I do.

1 Q You didn't rely upon that in your supplemental report,
2 did you?

3 A No, I'm taking the list of loans that I've been given
4 as a given and calculated the purchase prices. I'm not --
5 I'm not making a determination of which are valid claims and
6 which are not.

7 Q But you didn't cite that reservation, right?

8 A That's correct.

9 Q And, similarly, if you look down below that, there's
10 Footnote 2 in the same document. You cite to the beginning
11 of the footnote but you don't cite the final sentence,
12 right? "The plan administrator's review of the file and
13 supporting documentation supports a purchase price no
14 greater than the amount identified in the Debtor's adjusted
15 purchase price column." Do you see that?

16 A I do.

17 Q You also don't cite that in your --

18 A That's correct.

19 Q Is it your understanding that the purpose of this
20 estimation proceeding is to estimate what the size of the
21 claim would be had the protocol been completed?

22 A Roughly speaking, yes.

23 Q And in connection with putting together your report in
24 this case, you reviewed the protocol, right?

25 A Correct.

1 Q And you're aware that Step One of the protocol involved
2 the production and review of claims filed by the Trustees?

3 A Correct.

4 Q And Step Two involved the review of claim files by the
5 plan administrator, correct?

6 A Correct. And I understand Step Two be that the plan
7 administrator would either accept the purchase price or put
8 forward an alternative purchase price.

9 Q Okay. And Step Three of the protocol involved a
10 nonbinding negotiation procedure for rejected claims and
11 disputed approved claims. Are you aware of that?

12 A I am.

13 Q Now, did your calculation in this case seek to take
14 into consideration what would happen in that stage of the
15 protocol?

16 A My expert mandate was to calculate purchase prices per
17 the protocol order.

18 Q So you didn't take into consideration anything you
19 understood would happen in Stage Three, correct?

20 A No, I did not.

21 Q Similarly, with Step Four of the protocol, a nonbinding
22 dispute resolution procedure, your purchase price
23 calculation didn't seek to take into consideration in any
24 way what would happen in Step Four of the protocol, correct?

25 A Correct.

1 Q And, finally, Dr. Snow, you understand that ultimately
2 as part of the final step of the protocol there would be a
3 potential trial on this matter where a full adjudication of
4 the claims and all defenses would occur, correct?

5 A Correct.

6 Q And your purchase price calculation didn't seek to take
7 into consideration in any way what would happen in Step Five
8 of the protocol, correct?

9 A No. I was asked to calculate purchase prices, and I
10 understand that those may be used in this estimation hearing
11 for the purposes of assessing damages.

12 Q Okay.

13 MR. MCCALLEN: No further questions, Your Honor.

14 THE COURT: Thank you. All right. How much
15 redirect to you think that you have Ms. Black? Do you want
16 to take a few minutes? The reason I'm asking is because I
17 need to make a record in the other courtroom that'll take,
18 hopefully, just five or ten minutes. So my only question is
19 whether we keep going now or I do that and we come back.
20 Obviously, I think we want to finish Dr. Snow before the
21 lunchbreak.

22 MS. BLACK: I believe no more than 15 minutes.
23 That's my rough estimate.

24 THE COURT: Okay. All right. Would you mind if I
25 went off and did this other thing so that that group can

1 leave, you can collect your notes, I'll come back by 12:30,
2 we'll finish with Dr. Snow, and then we'll take the
3 lunchbreak? All right? Yes, Mr. Shuster?

4 MR. SHUSTER: Can I raise one scheduling issue?

5 THE COURT: Of course.

6 MR. SHUSTER: So, we're prepared to call Judge
7 Smith this afternoon after lunch.

8 THE COURT: Okay.

9 MR. SHUSTER: But we won't be prepared to bring in
10 another witness after that.

11 THE COURT: Okay.

12 MR. SHUSTER: So, tomorrow we would have Ellison
13 and Finkel, both of whom are short.

14 THE COURT: That sounds fine. Any issues? Mr.
15 Cosenza?

16 MR. COSENZA: Well, Your Honor, my only issue with
17 that is running out of days. Ellison was scheduled to
18 commence after Smith. Everyone knew Smith was a short
19 witness, if at all a permissible witness. And I just think,
20 you know, there's two or three hours of potential time with
21 Ellison that we're losing this afternoon.

22 THE COURT: Is there any chance of not finishing
23 the other two witnesses tomorrow?

24 MR. SHUSTER: I don't think so. And, candidly, we
25 got thrown off a little bit because we --

1 THE COURT: Yeah.

2 MR. SHUSTER: Because of yesterday and Ms. Black
3 is putting on Mr. Ellison, Dr. Ellison --

4 THE COURT: Dr. Ellison.

5 MR. SHUSTER: And so that's why we're a little bit
6 in this bind. So, but I'm confident -- I mean, the direct
7 of Ellison is an hour to an hour and a half, and the Finkel
8 direct is no more than an hour. So...

9 THE COURT: Okay.

10 MR. COSENZA: Would they also -- what about mister
11 -- I really -- I apologize, Your Honor, I should've raised
12 this yesterday because I suspected something like this would
13 happen, to prevent further delay. Who is their next witness
14 after Finkel and can we be sure he's available tomorrow? In
15 case this goes quickly --

16 THE COURT: Okay, why don't I go -- why don't I go
17 take care of what I need to take care of? Why don't you
18 folks talk to each other and then we'll try to release Dr.
19 Snow, and then we can take it up further if you're not on
20 the same page.

21 MR. SHUSTER: Thank you.

22 THE COURT: All right? Okay, I'll be back in ten
23 minutes.

24 (Recess)

25 THE COURT: Please, have a seat. Okay, Ms. Black.

1 RE-EXAMINATION OF DR. KARL N. SNOW

2 BY MS. BLACK:

3 Q Dr. Snow, counsel for the plan administrator asked you
4 earlier about the performance data that you relied on for
5 purposes of calculating your purchase prices, specifically
6 the master servicing monthly loan level data, the Moody's
7 data, INTAX, and the Trustee remittance reports, remember
8 that?

9 A I do.

10 Q Have you seen any evidence put forward by the plan
11 administrator or any of its experts on even one of the
12 76,044 loans for which you calculated a purchase price
13 showing that such data is inaccurate?

14 A No, I have not.

15 Q You calculated a purchase price for 60,305 liquidated
16 loans using the realized loss number reported by the
17 servicer that you gathered from the servicing data, Moody's,
18 INTAX, Trustee remittance reports, as the case may be,
19 correct?

20 A Correct.

21 Q Did Dr. Cornell or any other plan administrator expert
22 for that matter identify any errors in the purchase prices
23 you calculated for any of the liquidated loans based on
24 information from a loss certificate?

25 A No. And, in fact, in Dr. Cornell's reply report he

1 adopted some of my numbers and said he would not have done
2 so had there been errors, and he had, in fact, examined to
3 see if there had been errors.

4 Q Thank you. You reviewed loss certificates for 154
5 loans in connection with the sample that you drew. Do loss
6 certificates in general report the prorated interest that
7 accrued in the month of liquidation?

8 A I would say that it's kind of hit and miss on that. We
9 saw many that reported that interest for that month and some
10 that did not.

11 Q And is that information, the prorated interest that
12 accrued in a month of liquidation, generally reported in the
13 servicing data that you relied on?

14 A It is.

15 Q And in that sense, when it comes to the interest
16 component, which data source is more accurate, the loss
17 certificate or the servicing data?

18 A Well, I would say the servicing data. And especially
19 if one wanted to do some sort of temporal analysis like the
20 post and prepetition, post and pre-rejection, that you would
21 not see in a loss certificate. That would have to go to the
22 underlying master servicing data to calculate.

23 Q And is that what you did in connection with your
24 supplemental report?

25 A It is.

1 Q Are there any other ways in which a loss certificate is
2 less accurate and less up to date than the current servicing
3 data?

4 A Yes. As I have explained previously, the loss
5 certificates are a snapshot at a point in time. It does not
6 account for subsequent losses and recoveries on a loan. And
7 that is reflected in the master servicing data and trustee
8 remittance reports.

9 Q Does the fact that you were able to tie out the loss
10 certificate data to the realized loss reported by the
11 servicer in the servicing data for the 154 loans once you
12 factored in the trailing recoveries and expenses support
13 your position that the servicer reported realized loss is
14 reliable?

15 A Yes, I do.

16 MS. BLACK: I don't have any further questions at
17 this time.

18 THE COURT: Okay. Excellent. Mr. McCallen,
19 anything more?

20 MR. MCCALLEN: Nothing further, Your Honor.

21 THE COURT: Okay. Mr. Shuster? It would be
22 surprising but okay. Dr. Snow, thank you very much, sir.
23 You're excused.

24 DR. SNOW: Thank you.

25 THE COURT: Enjoy the rest of your day. Okay, is

1 there anything we need to talk about before we break?

2 MR. COSENZA: No, we actually -- we had a
3 discussion and we're going to try to work out our schedule
4 and try to create more certainty, and we're going to
5 continue to talk after lunch.

6 THE COURT: Okay. It would be helpful to me if I
7 could have a little more leeway to take care of this other
8 matter during this lunch hour. Would it be possible to
9 resume at 2 o'clock instead of in an hour?

10 MR. SHUSTER: That would be fine, Your Honor.

11 MAN 1: Great.

12 THE COURT: Wonderful. All right, we'll see you
13 back here at 2 o'clock.

14 MR. SHUSTER: Thank you.

15 (Recess)

16 THE COURT: All right, thank you for giving me a
17 little more time to get that other matter resolved. Please,
18 have a seat. Ready to go when you are.

19 MR. SHUSTER: Your Honor, the Trustees will call
20 Robert Smith and Mr. DeMay will conduct the examination.

21 THE COURT: Very good.

22 MR. DEMAY: Good afternoon, Your Honor.

23 THE COURT: Hello. Hello, Judge Smith, how are
24 you?

25 MR. SMITH: Okay. How are you?

1 THE COURT: Pretty good. Please, come on up.
2 Would you raise your right hand, please? Do you solemnly
3 swear or affirm that all the testimony you're about to give
4 before the Court shall be the truth, the whole truth, and
5 nothing but the truth?

6 MR. SMITH: I do.

7 THE COURT: Very good. Please have a seat. Make
8 yourself comfortable. Adjust that microphone up a little
9 bit. Very good.

10 MR. SMITH: Is it working?

11 THE COURT: It's working. Let us know if you need
12 a break at any time.

13 MR. SMITH: Thank you.

14 THE COURT: Do you have a binder? Thank you.

15 MR. DEMAY: May I proceed?

16 THE COURT: Yes, go ahead.

17 DIRECT EXAMINATION OF HON. ROBERT S. SMITH

18 BY MR. DEMAY:

19 Q Good afternoon, Judge Smith.

20 A Good afternoon.

21 Q Can you please describe your educational background?

22 A I'm a graduate of Stanford University and Columbia Law
23 School.

24 Q And what did you do following law school?

25 A I went to work at Paul Weiss and remained there for --

1 with a year's leave in the middle, for about 34 years.

2 Q And what was the nature of your practice?

3 A Litigation. Principally civil commercial litigation.

4 Q And did you serve on the judiciary?

5 A Yes. I became a judge of the New York Court of Appeals
6 in 2004 and served until mandatory retirement in 2014.

7 Q And since stepping away from the bench have you
8 continued to practice as a trial attorney?

9 A Yes. I'm back practicing law.

10 Q And where is that?

11 A The Friedman Kaplan firm.

12 Q Have you taught courses at any law schools?

13 A Yes, I've taught at both Columbia and Cardozo.

14 Q And what did you teach at Columbia?

15 A At Columbia I taught contracts, civil procedure, and a
16 seminar that took on various names -- it started as a
17 seminar for complex litigation and I tried to change the
18 name to get more students to take it.

19 THE COURT: Did it work?

20 MR. SMITH: Not all that well. Word leaked out
21 that there were two papers.

22 Q How long did you teach at Columbia Law School?

23 A Full-time for a year, that was the year I was on leave
24 from Paul Weiss, and after that I taught the seminar for
25 nine more years.

1 Q And did you teach anywhere else other than Colombia?

2 A Yes, I taught at Cardozo in -- from 2006 to I think
3 2010. I taught the course in state constitutional law. And
4 after that I co-taught with Professor David Rubenstein a
5 class that generally dealt with constitutional law issues.

6 Q And did you practice any -- anywhere between Paul Weiss
7 and the time you served on the bench?

8 A Yes, only for a few months, although that wasn't the
9 way I planned it. I left Paul Weiss and I became an
10 individual practitioner, and also had a kind of a special
11 counsel relationship with a firm called Korstein Veisz
12 Wexler & Pollard.

13 Q In total, approximately how many years have you worked
14 as a trial attorney, judge, or in academia?

15 A Well, it'll be 50 years this September. I'm sorry,
16 December.

17 Q In your 50-year career, approximately how many cases
18 have you tried?

19 A I don't have to be approximate. I think it's 52. I
20 keep a list.

21 Q And in the field of complex commercial litigation, is
22 that a normal amount in your experience?

23 A I think for a big firm litigator it's very high. I
24 think it's unusual.

25 Q And how many appeals have you argued in your career?

1 A I think that's...I can't be quite precise but it's over
2 50. Between 50 and 55, I would say.

3 Q And in what types of courts have you argued appeals?

4 A Well, I argued twice in the United States Supreme
5 Court, I've argued I think six times in the New York Court
6 of Appeals, I've argued in all four of the Appellate
7 Divisions, and in the -- also a couple of times in the
8 Appellate Term in the New York State Court system. I've
9 argued in -- I like to keep...the 1st, 2nd, 4th, 5th, 6th,
10 7th, and 8th Circuits in the Federal Court, and I've argued
11 in Appellate Courts in New Jersey and Massachusetts, and
12 also in Texas and Virginia.

13 Q In addition to trying cases, do you have experience in
14 negotiating settlements of litigated and threatened disputes
15 on behalf of your clients?

16 A Yes, I do.

17 Q And would that include on behalf of both plaintiffs and
18 defendants?

19 A Yes.

20 Q Can you estimate how many cases you have settled or
21 engaged in active settlement discussions in during your
22 career as a trial attorney?

23 A I can't be any more precise than hundreds. Certainly
24 hundreds.

25 Q And what about since stepping away from the bench?

1 A Yes, I've continued to do that. I've been a mediator
2 in three cases, two of which settled, and I've -- I can call
3 to mind immediately three or four cases I worked on in which
4 I also negotiated settlements. There are probably more.

5 Q Is it fair to say that you have extensive experience in
6 advising clients concerning the settlement of litigated and
7 threatened disputes?

8 A Yes.

9 Q In your experience settling hundreds of cases and
10 trying over 50, have you developed expertise in how
11 litigants' views of the merits and of the prospect of
12 settlement develop as a case progresses?

13 A Yes, I think I have.

14 Q In your experience settling hundreds of cases and
15 trying over 50, have you developed expertise in making
16 realistic assessments of the likely outcome of a case?

17 A I hope so. I'm not infallible but I have developed
18 some expertise.

19 Q And today, do you intend to opine on any legal
20 standards or questions of law?

21 A No, I don't.

22 MR. DEMAY: Your Honor, the Trustees proffer Judge
23 Smith as an expert in the negotiation and evaluation of
24 litigation settlements.

25 THE COURT: Okay. Mr. Cosenza?

1 MR. COSENZA: Your Honor, we object. I'd like to
2 voir dire the witness.

3 THE COURT: Okay, go ahead.

4 MR. COSENZA: I think we should also hand out our
5 binders. In case you have a reference to a deposition, the
6 transcript will have that. May I approach?

7 THE COURT: Yes. Mr. DeMay, can I ask you to come
8 up and you can bring one of your colleagues if you like.
9 Okay, go ahead, Mr. Cosenza.

10 MR. COSENZA: Yes.

11 VOIR DIRE OF HON. ROBERT S. SMITH

12 BY MR. COSENZA:

13 Q Good afternoon.

14 A Good afternoon.

15 Q Mr. Smith, you don't have any degrees in economics,
16 correct?

17 A I do not.

18 Q And you have no formal economic training, correct?

19 A Well, I'll -- the answer I gave at my deposition, I
20 took Economics 101 in college.

21 Q Okay, but beyond that, nothing?

22 A Beyond that, nothing.

23 Q You don't view yourself as an economist, correct?

24 A I'm not an economist.

25 Q And you performed no quantitative calculations for the

1 purpose of issuing your report in this case, correct?

2 A I believe that's correct.

3 Q Okay. And there's no specific professional academic or
4 other experience that you were drawing upon in issuing your
5 expert report that was not part of your experience as a
6 commercial litigator or a judge, correct?

7 A I think that's right. I mean, we all draw on our
8 general life experiences but I can't identify anything more
9 specific.

10 Q And I think in your deposition you stated that you
11 defined the subject matter of your expertise here as trying
12 to predict an outcome of a case, correct?

13 A Yes.

14 Q And someone who practiced as a bankruptcy lawyer could
15 have comparable experience and expertise in trying to
16 predict an outcome of a case, correct?

17 A I would think so, yes.

18 Q And, hypothetically, any Bankruptcy Court judge could
19 have similar experience in trying to predict the outcome of
20 a case, correct?

21 A Perhaps similar experience isn't correct. All our
22 experiences are different, but they certainly are --
23 certainly anyone who is a bankruptcy judge probably does
24 have some expertise in trying to predict the outcome of a
25 case.

1 Q And in part that's because you cannot identify any
2 credentials that would qualify someone as an expert in
3 trying to predict the outcome of a case, correct?

4 A That is correct.

5 Q And you cannot point to any particular objective
6 metrics that would allow someone to know when a person has
7 gained sufficient experience or expertise in trying to
8 predict an outcome of a case, correct?

9 A That is correct.

10 Q And, therefore, you would consider your peers with
11 respect to the subject matter area here of trying to predict
12 an outcome of a case to be any experienced lawyer, correct?

13 A In a sense -- in a sense that's fair. Any experienced
14 lawyer certainly has some of the expertise I'm talking
15 about. Whether that lawyer has the same expertise that I
16 may have would depend on a lot of things.

17 Q Okay. Mr. Smith, I think in Tab 1 of your binder --
18 I'm going to refer you to your deposition, Page 27, Lines
19 14-18. And I'll give you a minute to get to it. It's Tab 1
20 in your binder. I just handed it...

21 A Well, my tabs don't have number on them but it's the
22 first tab?

23 Q Yeah, it's the first tab.

24 A Oh, I see.

25 Q Okay, it's Page 27, Lines 14-18.

1 A 27, you said?

2 Q Yes.

3 A 14 through 18, okay.

4 Q And you were asked this question, right? "With respect
5 to the subject matter -- or subject matter area of trying to
6 predict an outcome of a case, who do you consider to be your
7 peers in that field?" And you answered, "Any experienced
8 lawyer."

9 A Yes.

10 Q You were asked that question and you gave that answer?

11 A Yes.

12 MR. DEMAY: Your Honor, I think for completeness
13 the next question and answer should be read.

14 THE COURT: Okay, would you read that, Mr.
15 Cosenza, please?

16 MR. COSENZA: Yes.

17 Q "Question: How would you define, quote, 'experienced
18 lawyer'?" Closed quote. "Someone who has been doing it a
19 long time. And how do I define a long time? I do not have
20 a specific definition but I think most people would get the
21 idea."

22 And, Your Honor, Judge Chapman would certainly
23 meet that criteria, correct?

24 A Certainly.

25 Q Therefore, you do not know whether your opinion

1 provides Judge Chapman with any analysis that she lacks the
2 expertise to perform herself, correct?

3 A I would not -- I do not know, no. I think that's up to
4 her to decide.

5 MR. COSENZA: Your Honor, I just think under rule
6 -- my motion is under Rule 702. It requires that an expert
7 witness's testimony will, quote, "help the trier of fact
8 understand the evidence or to determine a fact at issue".
9 As I mentioned, the trier of fact here is Your Honor, and as
10 you just heard from Mr. Smith, he admits that a Bankruptcy
11 Court judge would be just as qualified in his field of
12 expertise because his purported expert testimony cannot
13 assist or provide great assistance to the trier of fact, we
14 move to strike it as inadmissible.

15 THE COURT: Mr. DeMay?

16 MR. DEMAY: Your Honor, in a bench trial, Rule 702
17 does not require the drastic step of excluding Judge Smith's
18 testimony. Judge Smith is one of the most esteemed
19 litigators in the state and in the country. In his 50-year
20 career he's practiced complex commercial litigation at the
21 highest levels and has served with distinction on the
22 state's highest court. He's tried over 50 cases, he has
23 settled hundreds more.

24 Giving due respect to his career, there are few,
25 if any, individuals with the breadth and depth of his

1 experience regarding the negotiation and evaluation of
2 litigation settlements. He has substantial insight into why
3 cases settle where they do and what inferences can be
4 reliably drawn from the fact of a settlement.

5 He is responding to the opinion of Professor
6 Fischel. Professor Fischel opines that based on the fact of
7 a settlement, certain inferences can be drawn, in fact, from
8 the fact of that settlement. Judge Smith will testify that
9 Professor Fischel has made a lot of assumptions about
10 preconditions that are necessary for those inferences to be
11 validly drawn, and Judge Smith will explain in his extensive
12 experience that those preconditions generally do not exist
13 in the real world and they don't exist in this case. He is
14 not opining on -- he's not trying to predict the outcome of
15 this case; he is critiquing Professor Fischel's methodology
16 that Professor Fischel believes will help the Court --

17 THE COURT: But he is trying to predict the
18 outcome of the case. He's trying to -- you're asking Judge
19 Smith to convince me that the outcome of the case is not --
20 would not be what the plan administrator says it would be.

21 MR. DEMAY: That is not what Judge Smith will be
22 testifying to, Your Honor. We haven't gotten to his
23 testimony yet. All he is doing is critiquing the
24 assumptions that Professor Fischel makes and explaining why
25 the inferences that Professor Fischel draws are not based in

1 reality. They are economists' theories. They do not
2 comport with the way that settlements work in the real
3 world. And because of that, reliable inferences cannot be
4 drawn from Professor Fischel's testimony and from Professor
5 Fischel's opinions.

6 That's all he's doing. He's not explaining what
7 the right results should be in this case or in any case.
8 All he's doing is explaining that Professor Fischel does not
9 provide any testimony that is reliable to any point the
10 Court is deciding.

11 THE COURT: Mr. Cosenza, briefly?

12 MR. COSENZA: I have a very brief response. I am
13 not challenging Mr. Smith as a capable jurist and a lawyer.
14 That's not the point of the exercise here. What the point
15 is is his subject matter expertise, as stated, is to predict
16 the outcome of the case and now we're even saying he's not
17 going to be helping predict the outcome of this case. He's
18 not an economist, he has no experience in RMBS settlement
19 context.

20 THE COURT: Okay, look --

21 MR. COSENZA: How he's satisfied 702 and our
22 motion to exclude him on that basis stands, Your Honor.

23 THE COURT: All right.

24 MR. DEMAY: May I respond very briefly, Your
25 Honor?

1 THE COURT: Very briefly.

2 MR. DEMAY: The 2nd Circuit -- in the 2nd Circuit
3 the law is clear that Rule 702 applies much more flexibly in
4 a bench trial. And the Trustees are convinced that the
5 Court is very capable of listening to Judge Smith's
6 testimony, deciding what is helpful, and if there's anything
7 the Court believes is unhelpful, giving that testimony
8 little or no weight.

9 THE COURT: Well, my inclination in this case is
10 that it's a privilege to have Judge Smith sitting in the
11 witness box. I'm happy to listen to what he has to say. I
12 have reservations, I would say, with respect to this entire
13 area of your case and of the plan administrator's case but
14 I've said it before and I'll say it again: This is a very
15 unusual case. It's not a garden variety complex litigation,
16 it's not a garden variety put-back litigation, if there is
17 such a thing. And because of the highly unusual nature of
18 the case and because of certain agreements that the parties
19 have entered into leading to this day, I'm going to hear
20 Judge Smith's testimony and I'll give it the weight that
21 believe that it deserves. All right?

22 MR. DEMAY: Thank you, Your Honor.

23 THE COURT: Okay, thank you.

24 MR. DEMAY: Your Honor, may I continue?

25 THE COURT: Yes.

1 MR. DEMAY: Thank you.

2 DIRECT EXAMINATION OF HON. ROBERT S. SMITH

3 BY MR. DEMAY:

4 Q Judge Smith, what were you asked to do in this matter?

5 A I was asked to read Professor Fischel's report and to
6 give my opinion about it.

7 Q And did you prepare an expert report?

8 A Yes, I did.

9 Q And can you please look in the binder we gave you at
10 the beginning at the second tab, which is TRX700?

11 A Yes.

12 Q Is this a copy of the final report you prepared?

13 A Yes.

14 Q How many views expressed by Professor Fischel were you
15 asked to address?

16 A Well, depending on how you count but I would say two.

17 Q And what are those?

18 A He opined, as I remember, that the behavior of the
19 institutional investors in connection with a 2015 abortive
20 settlement was an indication that that settlement valued the
21 case appropriately, and that the level -- that that proposed
22 settlement and the Trustees'... I'm sorry, the plan
23 administrator's proposed estimate -- estimation here is
24 within the range of what Professor Fischel calls comparable
25 settlements; and that the Trustees' proposed estimation is

1 well outside that range. Those are my recollection of his
2 two opinions.

3 Q And did you form an opinion of those two views
4 expressed in Professor Fischel's report?

5 A Well, yes. Although maybe I would say that my -- my
6 more -- the -- I formed an opinion really with the
7 assumption, which I take to be implicit in his report, that
8 those two opinions are a reasonable guide to what I take to
9 be the purpose of this hearing -- what I'm assuming to be
10 the purpose of this hearing, and the purpose I'm assuming is
11 the one that the plan administrator or Lehman stated in its
12 position statement, which I'm now reading from Paragraph 9
13 of my report where I quote the plan administrator saying
14 that the purpose is to make a realistic assessment of the
15 outcome of the Trustees' claims without the undue delay that
16 would likely occur if the parties were to adjudicate these
17 claims in their entirety.

18 So, I'm assuming that that's a correct statement
19 of the purpose of this estimation proceeding. And I'm -- my
20 opinion is that Professor Fischel's -- Professor Fischel's
21 opinion is of relatively little use in that enterprise.

22 Q Let's talk about his first -- Professor Fischel's first
23 opinion regarding the behavior of the institutional
24 investors. In your opinion, is the behavior of the
25 institutional investors the most appropriate or useful

1 guidepost here?

2 A Well, I would think not. Yeah, I would say no.

3 Q Are there other actors whose behavior you do think is
4 more relevant?

5 A To me, the obvious actor whose behavior would be
6 relevant is -- is the Trustees themselves. That is, as I
7 understand Professor Fischel's opinion, he explains that in
8 his view the institutional investors have such large -- a
9 large interest in the Plaintiff trusts that their interests
10 are aligned to a very substantial degree and they have a lot
11 at stake with the Plaintiffs. But nobody's more aligned
12 with the Plaintiffs than the Plaintiffs. And the fact that
13 the Plaintiffs rejected the settlement in 2015 seems at
14 least as relevant a behavior as the institutional investor's
15 willingness to accept it.

16 Q And in your experience negotiating hundreds of
17 settlements, what is the usual reason that a party does not
18 accept a settlement?

19 A The usual reason, it's not good enough.

20 Q And what did the Debtors do that you believe is
21 relevant?

22 A Well, the Debtor, after the 2015 settlement, failed and
23 they basically to some degree sweetened the deal, which
24 suggests to me that the Debtor at least thought that it was
25 -- that the claims here merited somewhat more value than

1 they had in the original 2015 settlement.

2 Q And does the Trustees' rejection of the 2015 settlement
3 tell you anything about the consideration offered in that
4 settlement?

5 A To me it's -- I should explain I'm not convinced that
6 this is the -- that any of this is -- that this whole
7 approach to predicting the outcome is the best. But it does
8 seem prima facie that the Trustees' rejection of the
9 settlement would indicate that they did not think it was
10 good enough.

11 Q Did Professor Fischel address this in his report?

12 A He did not address the Trustees' behavior in his
13 report.

14 Q And did Professor Fischel discuss the implications of
15 the Debtor's decision to, as you said, "sweeten the deal"?

16 A No, he did not.

17 Q On the Claimant's side, do you have an opinion on
18 whether it was appropriate for Professor Fischel to consider
19 the behavior of the institutional investors but not the
20 behavior of the Trustees?

21 A I would not want to opine that what he did was
22 inappropriate but to me it weakens -- it weakens the value
23 of his opinions considerably that he did not do that.

24 Q Which actor do you think is more appropriate in this
25 context to consider, the institutional investors or the

1 Trustees?

2 A I would think the Plaintiffs themselves would be the
3 obvious ones to consider, if you're going to take that
4 approach. Again, I want to be clear that I'm not -- I'm not
5 involved with that approach.

6 Q And you explained why Professor Fischel thought the
7 institutional investors were the most relevant actor due to
8 the size of their holdings. Do you remember that?

9 A Well, he did -- he certainly did talk about the size of
10 their holdings.

11 Q Wouldn't the views of the institutional investors
12 benefit all certificate holders equally?

13 A Well, if I understand your question, the answer is I do
14 not know. They might not. That is, it is certainly
15 possible -- I don't know. But it's certainly possible that
16 the institutional investors would have perhaps a more senior
17 position in the capital structure to that a settlement would
18 be much -- any particular settlement might offer them a much
19 more attractive return than people lower down the food
20 chain.

21 Q Did Professor Fischel address this in his report?

22 A He did not.

23 Q Let's assume that the institutional investors are a
24 relevant litigant to look at; not the Trustees. Would
25 looking at the 2015 settlement that was accepted by the

1 institutional investors but rejected by the Trustees be a
2 proper method of measuring the likely outcome of a case?

3 A Well, I think it would have some serious deficiencies.
4 Even... Well, I'll withdraw the "even". I think it would
5 have some serious deficiencies.

6 Q And why is that?

7 A Well, first, as I understand it, the information
8 available to the institutional investors in 2015 was much
9 less than the information that would be available -- was
10 available even before this trial started. And that the --
11 I'm informed that the Trustees had conducted a very detailed
12 review of all the very many, many loan files in the case and
13 I don't know whether that had been done at the time the
14 institutional investors made their judgment on the
15 settlement. But I am -- I do understand that they did not
16 have access to the results of it.

17 Q What would be an example in this context of more
18 complete information?

19 A Well, I guess, if you had the results, which I want to
20 stress I haven't seen myself -- but if there has been a
21 detailed review of the facts of the case, an analysis by
22 competent people of how good the case is, it seems to me
23 that's rather a valuable source of information in deciding
24 what the case is worth.

25 Q And are there any other individuals involved in this

1 case who would have that information that the institutional
2 investors would not?

3 A Well, I guess -- I'm not sure I understand your
4 question. But I guess anybody who's read the outcome of the
5 loan review would have more information than the Trustee,
6 that the institutional investors had then.

7 Q And do you have any understanding of the persons
8 involved in the case who will have access to the results of
9 the loan review?

10 A Well, I assume that Judge Chapman will be among those
11 people. And the other -- I guess, to continue an answer to
12 your earlier question, apart from the additional information
13 that came in more extensive -- much more extensive
14 preparation from the case -- for the case than had occurred
15 in 2015, the mere fact that there will be some degree of
16 testing of both sides' cases in an adversary proceeding, the
17 one we're sitting in here now, to me seems very, very
18 important. Much more -- you know, whatever comes out of
19 this trial, assuming that it's the trial -- something more
20 than Professor Fischel indeed debating whether his report is
21 useful -- I would think that whatever can be learned about
22 the case in this proceeding would be much more valuable than
23 whatever even the most sophisticated investors could have
24 figured out in 2015.

25 Q What would that level of information about the loan

1 level review allow someone to do?

2 A Well, to me, the -- I guess what I'm really saying is
3 that if you want to figure -- if you want the best idea you
4 can possibly have of how a case is going to come out,
5 there's really no substitute for knowing the case. Knowing
6 the facts and the applicable law. And the facts are very
7 often much more important.

8 I understand that the facts in this case are
9 enormous and that there would be very serious disadvantage
10 trying to assimilate them all. But the more you can --
11 frankly, the more you can get inside your head, the better
12 you're able to judge the case. It's as simple as that.

13 Q Let's assume a settling plaintiff does have complete
14 information about its case. In your experience, would a
15 virtually fully informed plaintiff who accepts a settlement
16 be a reliable indicator of the value of that party's claims?

17 A Yeah, it would be a more imperfect indicator than you
18 might think because in my experience, plaintiffs,
19 particularly plaintiffs with good cases tend to take a
20 bigger discount than a purely mathematical, logical analysis
21 would predict.

22 Q What do you mean by the "purely mathematical, logical
23 analysis"?

24 A I mean, well, I mean that I can understand the theory
25 that says the settlement to which a plaintiff or a defendant

1 would agree is nothing more than the amount in controversy
2 discounted by the probability of success. It's my
3 experience that obviously no one ever does that perfectly
4 because no one ever has perfect information and perfect
5 predictive powers, but that plaintiffs tend to be more
6 conservative than defendants. That plaintiffs are -- the
7 plaintiff, perhaps because he's -- perhaps because he's
8 getting something more than he has now, he, or she, or it,
9 more than it has now, is less -- is more likely to take a
10 more conservative view of what's acceptable.

11 And, again, I have seen it happen more than once
12 that a plaintiff who believed itself to have a very good
13 case, a significantly better than 50/50 chance of winning,
14 was nevertheless perfectly happy to take half or even a
15 shade less in settlement. I've almost never seen except in
16 -- you know, I guess I've never -- I don't remember seeing
17 except in very unusual circumstances a case where a
18 plaintiff will turn down 50 cents on the dollars. Of
19 course, you know, there are cases where you will where
20 you've got a promissory note with no real defenses to it or
21 with -- it's a mortgage foreclosure or a judgment. But
22 there are very few litigations where a plaintiff won't take
23 50 cents on the dollar.

24 Q Can you describe from your years of experience an
25 example of this phenomenon?

1 A Yeah. I mean it's -- I have a tendency to remember
2 things that happened early in my career before all things
3 start to blend together. But I remember a case I tried some
4 40 years ago with a more senior colleague at Paul Weiss, and
5 it was a suit on a -- by a small bank on an -- against an
6 insurance company on a Fidelity bond. And it's easy to use
7 for this purpose because there was no doubt about the
8 damages because the loss incurred by the plaintiff was in
9 excess of the policy limits, at least that's the way I
10 remember it.

11 And the -- and we thought we had an excellent
12 case. We ultimately won the case. And I would have been
13 very surprised and disappointed if we would have lost it.
14 But we -- after consulting with the client and when the
15 judge asked for our settlement position at the outcome of
16 the trial, we said if you can get the defendant down to
17 half, we'll take it. He could not get the defendant down to
18 half. We didn't take it, and we won the case.

19 Q Based on your --

20 A I guess I should have said you get the defendant up,
21 you get the plaintiff down, but you know what I meant.

22 Q Based on your experience, what conclusions about the
23 value of the claims here do you think can be reliably
24 inferred from the institutional investors' decision to
25 accept \$2.4 billion to compromise the Trustees' claims?

1 A Very little could be reliably inferred about the value
2 of the claims.

3 Q Judge Smith, let's turn to Professor Fischel's
4 comparable settlements. In your opinion, does Professor
5 Fischel's analysis of what he calls "comparable settlements"
6 offer an appropriate or useful guide post to value the
7 claims here?

8 A I would say his analysis does not.

9 Q And why not?

10 A Well, because he doesn't -- it's not clear that the
11 settlements are indeed comparable in any -- in any important
12 sense. That is, he describes in purely qualitative terms a
13 great many very important differences between this case and
14 the other -- and the others. And he says while some of them
15 are -- some of them would make the settlement higher and
16 some of them would make the settlement lower, but he doesn't
17 attach any numbers to them.

18 He doesn't -- he does not say that he's done an
19 analysis and concluded that the positive and negative
20 factors balance out. He just says there are differences,
21 and that seems to me to render the whole exercise a very
22 limited use.

23 Q In your 50 years of litigation experience, do you think
24 there are better methods for making a realistic assessment
25 of the outcome of litigation compared to something that

1 happened in a previous case?

2 A Yes. I mean as I've said earlier, I prefer the old-
3 fashioned way, which is you just learn as much as you can
4 about the case and also that if where you have the --
5 because usually when you're deciding to settle a case, you
6 don't have the advantage of testing an adversary proceeding.
7 That's sort of the -- in the nature of a settlement.

8 But it is undoubtedly a fact that you can prepare
9 for a trial -- prepare for a case for five years and then it
10 goes to trial. And by the third day of trial, you have a
11 lot better understanding of how good your case is than you
12 got in the previous five years.

13 Q Are you aware whether the Trustees have offered their
14 own set of settlements that the Trustees believe are more
15 comparable than Professor Fischel's?

16 A I understand that they have done that.

17 Q Do you have any understanding of which factors went
18 into the Trustees' analysis on that (indiscernible)?

19 A Well, only -- only what I've been told. I have not --
20 I have not done any -- any such analysis myself. But I -- I
21 -- I'm informed that the Trustees have -- have presented an
22 analysis in which they rely on the -- they stress as
23 differences from other settlements or similarities to some
24 that they say are similar the absence of any statute of
25 limitations defense, the absence of any risk that the --

1 that the certificate holders will not direct the trustee to
2 bring the action, and the amount of -- of the actual
3 preparation, the actual work that's been done.

4 I understand that a tremendous effort -- as I said
5 before, there's been a huge effort put into reviewing loan
6 files. And it's my -- it's my understanding of the
7 Trustees' position is that that differentiates this case
8 from the ones Professor Fischel relies on and makes it more
9 similar to the ones the Trustees are relying on.

10 Q In your experience, are the types of factors you just
11 listed the types of factors that might be considered when
12 evaluating the likely outcome of a case?

13 A Well, yes, and I believe Professor Fischel thinks the
14 same. He -- he mentioned those factors, too.

15 Q In your experience, if you were comparing cases based
16 on similarities and differences when trying to assess the
17 likely outcome of a case, would you do any work to try and
18 reduce those differences to dollar values?

19 A If you were going to do that exercise at all, I would
20 think it would be more useful to do it perhaps the way a
21 real estate appraiser uses comparables all the time. Again,
22 I'm not -- to make it clear, I'm not in love with using
23 comparable settlements as the best yardstick for evaluating
24 a case, but if you're going to do comparables, I think what
25 I would do is I would pretend I was a real estate appraiser

1 and say, okay, well, you know, the appraiser says these two
2 apartments are alike except this one has a better view and
3 this one's on a higher floor and, therefore, I'd give a
4 bonus of 11 percent. And this one's a little further away
5 from the river, and I -- I decrease the assessment by 12
6 percent. There's nothing inherently impossible about doing
7 that with lawsuits if you're going to compare lawsuits.

8 Q Do you have any understanding whether that's some
9 analysis that the Trustees have tried to perform?

10 A My -- I have not seen the analysis, but I do understand
11 that the Trustees have tried to perform it.

12 Q And as a whole, based on your experience, does
13 Professor Fischel's report contain the kind of analysis that
14 is customarily employed in the field when making a realistic
15 assessment of the likely outcome of a case?

16 A No.

17 MR. DEMAY: Your Honor, the Trustees have no
18 further questions.

19 THE COURT: Okay. Thank you, Mr. DeMay.

20 Are you okay to continue --

21 MR. SMITH: Yes.

22 THE COURT: -- Judge Smith?

23 MR. SMITH: I'm fine. Thanks.

24 THE COURT: Okay. Mr. Cosenza?

25 CROSS-EXAMINATION OF HON. ROBERT S. SMITH

1 BY MR. COSENZA:

2 Q Good afternoon again, Mr. Smith.

3 A Good afternoon again.

4 Q During your time in private practice, you worked on
5 several bankruptcy matters, correct?

6 A Yes.

7 Q And you mostly represented creditors in those cases,
8 correct?

9 A I -- I can't think of a case where I represented a
10 debtor. I think it's probably all creditors.

11 Q Thank you. And you do not recall representing a
12 trustee, whether it be in bankruptcy court or in any other
13 litigation --

14 A That's correct.

15 Q -- correct?

16 A That's correct.

17 Q Nor do you ever --

18 A Oh, did I represent a trustee in other litigation? I
19 don't think so, no.

20 Q Nor did you ever represent a party in an estimation
21 proceeding, correct?

22 A No. I never did.

23 Q And you're not sure what the legal standard is in an
24 estimation proceeding, correct?

25 A Well, I'm not -- I'm not sure, not because I haven't

1 looked but because when I looked, I found it less than
2 crystal clear. But I am not sure.

3 Q And Mr. -- I just want to be very clear, in the
4 context, you understand that this proceeding is the
5 byproduct of a settlement agreement?

6 A Yes.

7 Q And you're aware of that. And you're aware of --

8 A That this is a byproduct of a settlement agreement
9 subsequent to the one that was rejected is my understanding,
10 yes.

11 Q Correct. And you understand as part of that settlement
12 agreement, comparable settlements were allowed into
13 evidence?

14 A Actually I didn't -- I don't remember knowing that, but
15 I'm not surprised to hear it.

16 Q Did you review Exhibit G to the protocol order?

17 A Yes. I do remember reviewing it once in my life, but I
18 don't -- I haven't reviewed it recently.

19 Q Okay. So you're just not familiar with -- with what
20 was allowed into evidence under Exhibit G?

21 A I did -- I do not remember worrying about what is
22 allowed into evidence in this proceeding except as it might
23 affect my own testimony --

24 Q Okay.

25 A -- or Professor Fischel's.

1 Q But isn't Professor Fischel's testimony on comparable
2 settlements and the fact that it's admitted under Exhibit G,
3 doesn't that impact your analysis?

4 A Well, the fact that -- the fact that the evidence he
5 relies on is admissible does not really impact my analysis.
6 I was not assuming it was inadmissible. I was suggesting
7 that his analysis is of limited use.

8 Q Okay. And it's up to the Court to -- to weigh the
9 evidence?

10 A Of course.

11 Q And you're currently serving as co-counsel with Holwell
12 Shuster under RMBS's case; is that correct?

13 A Well, I said that at my deposition, and I to my
14 embarrassment, I'm not sure. I do not know whether I was
15 right. I have since learned that Holwell Shuster is not of
16 record in the case. I am working with Holwell Shuster on a
17 case, and I do not know whether they are counsel for the
18 same client or whether they are counsel for another client
19 aligned in interest with that client.

20 Q So you --

21 THE COURT: Mr. Shuster, perhaps you could clarify
22 that after Judge Smith is done.

23 Q But during your deposition, you -- you noted that you
24 were working with Holwell Shuster as co-counsel in an RMBS
25 case?

1 A Yes. I certainly have been working with Mr. DeMay, as
2 a matter of fact, on a case in which we -- we certainly felt
3 like co-counsel, but I now realize that I don't actually
4 know whether he's literally representing the same client or
5 is representing a client aligned in interest.

6 Q Have you had a chance to review your deposition
7 transcript?

8 A Yes.

9 Q Did you amend your deposition transcript to fix this
10 error?

11 A No, I didn't. I just -- I just reviewed it the day
12 before yesterday. But no, I have not amended it.

13 Q Do you intend on doing that now in light of this
14 testimony?

15 A Well, I think maybe I just did, but if I should do it
16 more formally, I'd be happy to.

17 Q Okay. And the case you're talking about, that's
18 pending in the New York Court of Appeals?

19 A Yes.

20 Q And in that case, you represent Deutsche Bank as a
21 trustee for a trust, correct?

22 A Yes.

23 Q And you're aware that Deutsche Bank is one of the
24 trustees here?

25 A Yes.

1 Q And that didn't inhibit you from taking on this role as
2 an expert?

3 A No, it did not. I did not think that that was either
4 disqualifying or likely to -- likely to taint my opinion.

5 Q Did you do any analysis as to whether or not that was a
6 conflict for current purposes?

7 A Well, it depends what you mean by analysis. But I
8 certainly did give thought to that question and concluded
9 that it's not inappropriate to have a -- to represent one
10 trust in one case and to be an expert in other trusts in
11 another case, you know, even though the -- the same entity
12 is trustee.

13 Q Are you fees in that case, the other case you're
14 working on, are they being paid by Deutsche Bank?

15 A I am billing Deutsche. Well, I guess -- I assume that
16 they will be paid by the trust.

17 Q Okay. So you don't know who's paying those fees right
18 now? Do you know who you're sending the bill to?

19 A I hope somebody has, but I have not -- I do not
20 remember seeing a check.

21 Q Okay. And other than this case we just discussed, you
22 have not appeared for a party in any other RMBS case; is
23 that correct?

24 A I think that -- I think that's my best recollection. I
25 don't think I've appeared for a party in other RMBS case.

1 Q Okay. When you served on the Court of Appeals, there
2 were no RMBS cases that were decided by you, correct?

3 A To the best of my recollection, that's correct.

4 Q I'm not going to refer you to paragraph 26 of your
5 report, and that's Tab 2 in the binder that I handed over to
6 you.

7 A Let me use your binder.

8 Q I think it's on page 10.

9 A I'm sorry. Which -- what's the exhibit --

10 Q I'm sorry.

11 A -- number?

12 Q Tab 2. It's the second tab.

13 A Well, let's see. Oh, they do -- they do have numbers
14 on the tabs.

15 Q I know you said your tabs are not numbered.

16 A Okay.

17 Q It's paragraph 26, but I'm really looking at page 10,
18 the little Roman numeral 2.

19 A Page 10, Roman numeral 2. Yes.

20 Q And the second sentence there, it states that the
21 Trustees assert that this case is essentially trial-ready,
22 that they could proceed on relatively short notice with not
23 just an estimation hearing but a full trial in which they
24 could prove their case as to every one of the approximately
25 76,000 loans on which they rely. Do you see that?

1 A I do.

2 Q Did you do anything to get comfortable with the
3 statement that the Trustees could prove their case as to
4 every one of the 76,000 loans at issue in this estimation
5 proceeding?

6 A No, and I think I made it clear that I was merely
7 reflecting that that was -- that was their position.
8 Indeed, I -- you know, the --

9 Q I know you've made that clear, but, you know, a few
10 minutes ago you testified that you believe in the old-
11 fashioned way, which is you just learn as much as possible
12 about the case and the best way to make a real assessment of
13 the outcome of litigation is to dig deep and understand what
14 the facts are.

15 A Yes.

16 Q But you didn't do that here, correct?

17 A No, nor did I -- nor do I purport to make an assessment
18 of what the outcome of the case will be.

19 Q But that would be the best way of getting an assessment
20 of the case is to --

21 A Yes.

22 Q -- actually dig in?

23 A Yes.

24 Q You didn't do any of that here?

25 A I did not.

1 Q And you were not informed that the Trustees here are
2 seeking billions of dollars of interest including post-
3 petition interest that might not be recoverable as part of
4 their damages claim?

5 A I don't -- I don't think I remember any discussion of
6 post-petition interest.

7 Q Okay. So you were not advised of that before you
8 issued your report?

9 A Not to my recollection.

10 Q Did you testify at your deposition that based on your
11 experience litigating cases engaging in settlement
12 discussions, that the recurrability of interest is a factor
13 that the parties consider when they engage in the settlement
14 discussions, correct?

15 A I did, although I also said that it perhaps sometimes
16 gets less weight than it deserves. But yes.

17 Q And you understand that New York law requires there to
18 be a connection between the breach of a contract and the
19 damages that are suffered, correct?

20 A Well, I -- well, I am not testifying to give a legal
21 opinion, but I do understand that there should be a
22 connection.

23 Q Okay. And as part of drafting your expert report, you
24 were not specifically informed that the plan administrator's
25 arguing that the Trustees have failed to establish any such

1 causal connection with respect to all 76,000 loans at
2 issues, correct?

3 A You inserted the word "causal" the second time. I --
4 but it's true that I -- the whole causation issue was not
5 one that came up in the course of my preparation of my
6 report.

7 Q And you didn't find it relevant to the analysis you
8 performed, correct?

9 A Not at all, no.

10 Q Let's look at paragraph 14 of your amended report.
11 That's Tab 2. I think you've testified to this a few
12 minutes ago. And you state that it's your impression that
13 the Trustees did not accept a settlement from October 2015
14 because the Trustees thought the plan administrator's
15 settlement with the institutional investors was not good
16 enough, correct?

17 A Let's see. I think I testified a few minutes ago that
18 that was the likeliest reason. I --

19 Q Yes.

20 A I --

21 Q But that's really just a general --

22 A I'm not exactly --

23 Q But that's really just -- I'm sorry for -- anything
24 else?

25 A No, go ahead.

1 Q Okay. That's really just speculation based on little
2 more than an inference from the fact that that's the usual
3 reason for people rejecting settlements, correct?

4 A I would quibble with the word "speculation", but it is
5 the usual reason, and that's really the only basis I have,
6 yes.

7 Q And that's the only -- just to be clear, that's the
8 only basis you have proffered, correct?

9 A The only basis I have for thinking that was the reason
10 is --

11 Q Yes.

12 A -- that's usually the reason people -- yes, that's the
13 only one I can think of, yes.

14 Q Okay. You did not have any conversations with any of
15 the Trustees or their representatives about why the Trustees
16 did not accept the October 2015 settlement, correct?

17 A Correct.

18 Q I want to refer you to your original report that you
19 submitted in this case. If you just want to turn to
20 paragraph 3 -- sorry, paragraph 13.

21 A What's -- what's the tab?

22 Q It's Tab 3, paragraph 13. It's at the bottom of page
23 4, and I'll give you a minute to -- to catch up.

24 A Okay.

25 Q Okay. And there's a quote from the April 21, 2017

1 notice that the Trustees provided to investors that cites to
2 three different expert reports. Do you see that?

3 A Yes.

4 Q And those are the expert reports of the Honorable
5 Anthony J. Carpinello, the Honorable Arthur Gonzalez, and
6 Ronald Greenspan, correct?

7 A Yes.

8 Q And these are the expert reports the Trustees used in
9 deciding not to accept the October 2015 settlement, correct?

10 A Well, all I know is what it says there. And it says
11 that they worked with experienced counsel to consider the
12 offer, that they retained experts, that they named the
13 experts. That -- that was my understanding, yes.

14 Q And you have not read or seen Justice Carpinello's
15 expert report, correct?

16 A I sure haven't read it, and I don't think I've seen it.

17 MR. DEMAY: Well, objection, Your Honor. Judge
18 Smith was precluded from discussing his materials, and it's,
19 therefore, an improper subject of cross-examination.

20 THE COURT: Better come up.

21 (Sidebar Conference)

22 Q So I think we were on Justice Carpinello's report. Do
23 you recall seeing that report?

24 A I do not recall seeing it. I -- I am sure I did not
25 read it. It is -- I may or may not have had a copy of some

1 report by Justice Carpinello -- well, when I say a copy, I
2 mean an electronic copy. I'm not sure I ever had it. I
3 don't know if it's the same report, and I'm sure I've never
4 read it.

5 Q So sitting here today, you're not sure if you had -- if
6 you have seen Justice Carpinello's report?

7 A That's correct.

8 Q Did you have any discussions -- I'm just asking for a
9 yes/no -- with counsel about the substance of Justice
10 Carpinello's reports?

11 A I had discussions with counsel about the substance of a
12 report of Justice Carpinello. I do not know whether it was
13 this one.

14 THE COURT: We're going to take a break right now.
15 Judge Smith, if you don't mind, if you could take a lovely
16 stroll --

17 MR. SMITH: Sure.

18 THE COURT: -- down the corridor which is filled
19 with furniture while they recarpet an office, someone will
20 come and get you in the next ten minutes or so. And I know
21 I don't have to tell you this, but during your testimony,
22 you remain under oath. Please do not discuss the case or
23 your testimony with anyone or be in anyone's presence while
24 they're doing the same. All right? Thank you.

25 (Pause)

1 THE COURT: I'm going to ask both sides to
2 assemble the appropriate folks that are needed to discuss
3 these issues and meet me in the conference room in a couple
4 of minutes, please.

5 (Recess)

6 THE COURT: Please, have a seat. Okay, so, thank
7 you for staying and getting this done. I know that you
8 weren't planning on spending the day here, but hopefully,
9 it's been productive. So, who should I hear from? Yes.

10 MS. CAFFERATA: May I speak, Your Honor?

11 THE COURT: Sure.

12 MS. CAFFERATA: So, we have worked out some
13 language that we have agreed upon for certain of the issues,
14 but we have some things to discuss on part of it that I
15 think will maybe help us to resolve the remaining issues.

16 THE COURT: Okay. So, just for the purposes of
17 the record, what we're doing is we're going on the record
18 after the parties have been conferring for several hours
19 after there was an off-record conference this morning on the
20 subject of the letters that had been exchanged between the
21 parties with respect to Credit Suisse's compliance with the
22 Court's order regarding production of documents, and after
23 discussions in which I participated with all the parties,
24 the parties undertook to come to an agreement, and to put
25 certain language on the record that would reflect their

1 understandings going forward with respect to the nature of
2 the production and any additional exchanges that need to
3 take place and also with respect to certain matters in
4 relation to the conduct of the 30(b)(6) examinations. So,
5 with that background for the record, we can just go through
6 the issues.

7 MS. CAFFERATA: Thank you, Your Honor. The
8 language that we can agree to go in the stipulation, is as
9 follows: "Credit Suisse agrees that the compilation
10 spreadsheet received on January 9, 2018, constitutes what
11 Credit Suisse has in its possession, custody and control as
12 to, colon: One, it's end-of day mids for September 12
13 through 19, 2008; two, it's closeout mids for the trades in
14 its claim; three, the final closeout amount for each trade,
15 and four, the Bates numbers for the files supporting those
16 figures. In addition, Credit Suisse agrees to supplement
17 this spreadsheet by January 14, 2018, to include the risk
18 metrics associated with each trade that was recorded in the
19 ordinary course by Credit Suisse's systems, period."

20 THE COURT: Can I ask a question on that?

21 MS. CAFFERATA: Yes.

22 THE COURT: Is it clear to both of you how that
23 supplement, what form it's going to take? I don't want to
24 have another round of Lehman complaining that they've been
25 pointed a huge database and saying, "It's in there

1 somewhere."

2 MS. CAFFERATA: Good idea, Your Honor. Our vision
3 is that this would be supplementing the spreadsheet that
4 we've already received by adding columns, including in this
5 risk metrics.

6 THE COURT: Okay.

7 MR. MCATEE: And that's what we intend to do, Your
8 Honor.

9 THE COURT: Okay, great.

10 MS. CAFFERATA: And then that would be qualified
11 by the following language: "Provided, however, if
12 historical data or a mistake emerges in discovery, that in
13 good faith could not have been found previously, despite
14 reasonable efforts to locate it, Credit Suisse may seek to
15 amend the spreadsheet with that information." That's the
16 shoebox.

17 MR. MCATEE: Yes, Your Honor, that's agreeable.

18 THE COURT: That seems perfect.

19 MS. CAFFERATA: On the subject of the conference--

20 THE COURT: Yes.

21 MS. CAFFERATA: The language would be, "The
22 parties agree to schedule ...," think it should be 'hold,'
23 hold a conference. Sorry about that. "The parties agree to
24 hold an in-person or telephonic conference between counsel
25 prior ... five days prior to each 30(b)(6) deposition, in

1 order for the testifying party to identify the documents and
2 information relevant to the designated topics."

3 THE COURT: Okay. Perfect.

4 MS. CAFFERATA: So, that's our stipulated
5 language, Your Honor. Then, we have an issue that we
6 thought of a way to maybe address the problems that we're
7 having with respect to the topics and address some of Credit
8 Suisse's concerns on the deposition topics. And, so, we
9 proposed it, but Credit Suisse said it's not in a position
10 to agree to it yet, but we're thinking this might be a way
11 to deal with that set of issues.

12 And what it is, is to provide -- we asked for it
13 in the spreadsheet that we just described, along with the
14 risk metrics, to give us the Bates numbers of the supporting
15 materials that ... you know, the documents that provide the
16 support for their claim amounts, because we have the same
17 lack of roadmap with respect to that issue, and that would
18 seem like an easy way to just have it all in one place,
19 everyone can rely on it. And then, this question of how
20 much the witness needs to prepare is quite a bit more
21 simple, because for each trade, on each line, you know, oh,
22 they used these two sources, or these ... this one source,
23 and they can speak more broadly to that issue.

24 THE COURT: It seems sensible, if you think you
25 can accomplish that.

1 MR. MCATEE: What I told counsel was that the
2 first time that I had heard that request was in this
3 conference, and we're willing to consider the request and I
4 need to go back and talk to the team that has been doing
5 this --

6 THE COURT: Sure.

7 MR. MCATEE: -- my IT people, and figure out how
8 long it would take, because I'm not sure exactly how long it
9 would take, because I'm not sure exactly how long it would
10 take.

11 THE COURT: Right. I mean it's no small task.

12 MR. MCATEE: It's not a small task. It's not just
13 finding a mid. It's finding every quote for ... that's the
14 supporting package for everything, and that's going to take
15 some time.

16 THE COURT: Right.

17 MR. MCATEE: But what I said to counsel was we're
18 going to undertake an effort to do that and provide them
19 with something, just don't know how long that will take.

20 THE COURT: Sure. I mean ... I think it's
21 sensible. And it's ultimately, I would say, going to be
22 more efficient than having to construct it through a series
23 of witnesses to kind of do it.

24 MS. CAFFERATA: Well, we thought, Your Honor, if
25 they could possibly do it by January 17th -- and I mean this

1 is the stuff they should have in their DQ, so it should be a
2 matter of assembling it from that, I would think. But if
3 they could have it by the 17th, then we could agree to
4 language about... that they've proposed about the witness
5 not being expected to testify as to every possible detail.
6 And it would basically address that issue.

7 THE COURT: I mean, answering for Credit Suisse, I
8 would be surprised if, sitting here today, they could say
9 that they'd be able to accomplish it by the 17th. I mean
10 that's a week. So, I think that's a heavy lift. So, can we
11 get around committing to that date? I'm not comfortable
12 imposing that deadline. I mean, certainly, it shouldn't be
13 another month or three months, but a week seems too
14 aggressive. People are ... it's just, I don't think it's
15 capable of being accomplished. So, how can we ...?

16 MS. CAFFERATA: Well, when we asked about it an
17 hour ago, counsel didn't have any idea of when, you know,
18 couldn't put an estimate on when it might be available; he
19 needs to talk to people. So, I understand that. We just --
20 we're in deposition right now and we're trying to --

21 THE COURT: Sure

22 MR. MCATEE: -- (indiscernible) as quickly as we
23 can, so I don't -- something has to happen.

24 THE COURT: Okay. I'll take a representation that
25 you're going to make reasonable inquiry. And what's today?

1 Wednesday? Can you get back to Lehman by, to counsel by the
2 end of the day on Friday?

3 MR. MCATEE: Yes, Your Honor.

4 THE COURT: And then, if it's not, if the
5 timeframe to you is not acceptable, I mean we can add
6 another call. But I think a week is too short, I think a
7 month is too long, but I ... beyond that, it would be
8 presumptuous for me to pick a date.

9 MR. MCATEE: Thank you, Your Honor, and we'll give
10 it our best effort to do it as soon as possible. The one
11 caveat I want to make sure that I say on the record is,
12 we're going to do our best to have that whole list and have
13 all those Bates numbers. It's a long list. We're talking
14 thousands and thousands of documents. I just don't want
15 that to be subject to the kind of same, that will never
16 change unless there's a mistake or something. It's going to
17 be our best effort to put it all together, but that's kind
18 of a moving --

19 THE COURT: That's a different topic. I mean this
20 is a different topic. This is mapping all of your documents
21 to particular trades. I think that's ... I agree with that.
22 It's different than having you commit to what the basis of
23 your claim, essentially, is. I mean whether or not you
24 specify -- let me give you an example. Hypothetically,
25 Credit Suisse may not identify particular policies and

1 procedures as having anything to do with the calculation of
2 a particular closeout. Lehman might decide that they think
3 that they are. Well, they can't ... you have different
4 theories of the case, so that there might be different
5 documents that Lehman thinks that should be put into
6 evidence, either in support of or in opposition to the
7 closeout amount. So, I think that goes too far to the
8 extreme of having Credit Suisse kind of do the final trial
9 preparation at this stage. I think if we go down that path,
10 then we're undercutting where we started. Where we started
11 was where you needed to be, which is the complete record,
12 except for the shoebox. You've got that. Now, we are in,
13 in lieu of the 30(b)(6) witnesses, saying, "Here are the
14 documents I'm going to talk about," right, you're going to
15 have an index created. They can't be held to 100 percent on
16 that, I don't think.

17 MS. CAFFERATA: I think so, Your Honor. I mean
18 this is what we ... what we mean by support. I think if you
19 have a particular name, let's say, that you're valuing --

20 THE COURT: Right.

21 MS. CAFFERATA: -- and you have, the trader used,
22 you know, this screen shot and this other source, and they
23 have a general process of how they put together their number
24 for that name. That's something we would expect to be able
25 to ask a question of, "Oh, how did you do this?", right?

1 And the spreadsheet would, therefore, have -- it would point
2 us, for those trades, it would point us to the screenshot
3 and whatever the other thing was. And, so we're dealing
4 with just, usually a couple of items. I mean, I'm not
5 really sure -- talks about thousands, I'm not really sure
6 what he's talking about.

7 THE COURT: Let's use your example. If they, say,
8 for a particular position, there are a dozen screen shots,
9 right, what's the right answer for what they're supposed to
10 say? Is it the one screen shot, or is it more than one
11 screen shot to show that they didn't selectively pick a
12 screen shot from a particular time of day? So, I think
13 that, I would think that you would have the capability --
14 they have to produce all those screen shots to you, right?

15 MR. MCATEE: Yes, and we have --

16 THE COURT: Yeah. S, if they've produced all the
17 screen shots, then that's --

18 MS. CAFFERATA: But we're just asking for the one
19 they were light on. We should be able to know which one
20 they relied on.

21 THE COURT: But you've got that in the
22 compilation.

23 MS. CAFFERATA: That's what I'm saying. In the
24 compilation that's what we would expect.

25 THE COURT: You've got that in the compilation.

1 I'm talking about the road mapping of the documents for the
2 purpose of a deposition. You're not taking away, in the
3 second one what you gave in the first one, right?

4 MR. MCATEE: I was not intending to, Your Honor.

5 THE COURT: No, I --

6 MS. CAFFERATA: These are two different things.

7 THE COURT: Two different things, right. So, in
8 the first one, you've got what they're relying on. That is
9 what they are undertaking to do. So, that in the
10 deposition, it cannot be that the trader is going to say --
11 it's going to be bad, if the trader says it's not the screen
12 shot from, you know, from 12 o'clock on the 15th, it's the
13 screenshot from four o'clock on the 15th. They are supposed
14 to have told you in the compilation which screenshot they're
15 relying on.

16 MS. CAFFERATA: Right, except they're not agreeing
17 to that. What they are agreeing to provide, and the part
18 that we stipulated to, is the Bates number support for their
19 closeout mids, and for their end-of-day mids. What they
20 have not agreed to produce is what I think the Court is
21 referring to, and that we're suggesting is a good idea, is
22 to have a similar spreadsheet that has, on a trade-by-trade
23 basis, the Bates numbers of the support: the things that
24 they relied on to support their claim numbers, total claim
25 numbers, not just their mid. So that if they, you know, if

1 they used this spreadsheet over here to justify a bid or
2 offer charge or whatever else they added on above their
3 mids, then somebody is going to be able to testify to that.
4 This is what they were supposed to produce in their DQ,
5 right? We asked for this money and we have support for it.
6 So, that's what they're trying to package up so that we can
7 then rely on it, use it with the witness and have the
8 witness explain. These are the three things I looked for
9 and this is how we put together the numbers for this group
10 of trades. These other ones we did in this other way using
11 these four documents, or one document, or whatever. But
12 there aren't really thousands and thousands of anything that
13 I can think of that fit within that framework. It's just,
14 what did the traders use to support? And so, we don't need
15 the policies that they may be using. I mean we understand
16 there will be facts around what guidance they had but that
17 doesn't need to be --

18 THE COURT: What's the purpose of the conference?
19 The purpose of the conference is, we're giving you this
20 witness, here's the universe of documents that this witness
21 is going to talk to about. It's going to include all the
22 screen shots, all the different sources for the marks, all
23 of the corresponding -- I'm making this up -- all the
24 corresponding entries in the risk management systems, all
25 the hedges, all the email back and forth to people on other

1 desks. It's going to be the whole canon on information and
2 things that were generated around that particular closing.
3 So, I just don't, I'm just not understanding -- so, you have
4 the general universe, and then you take that and you, you
5 know, you conduct the deposition of the person. You closed
6 out these positions.

7 MS. CAFFERATA: What we try to do is we had asked
8 for the support that they used for their claim amounts a few
9 months ago. And they asked the same thing of us, we
10 produced it. They said, "No, we're not going to provide
11 that." So, then we used the 30(b)(6) topics to say, okay,
12 well, provide that through testimony and then they say it's
13 impossible.

14 THE COURT: I kind of missed this because I guess
15 I conflated, in my mind, the compilation, in fact, reflected
16 what the support was. So, that's not the case?

17 MR. MCATEE: The compilation, Your Honor, has the
18 mids, both end-of-day for the 12th through the 19th, and
19 also the closeout, the closeout amounts; if there was a bid
20 offer calculated it has that in it.

21 THE COURT: If there was a bid offer, if there was
22 liquidity.

23 MR. MCATEE: If it has risk metrics that were
24 associated with it and saved in or system that's going to be
25 put into the compilation. We'll have all of that in one

1 place.

2 THE COURT: Okay. So, if you have ... so, you
3 have a mid, and you had a bid offer charge, whatever, that
4 number had to come from somewhere, right?

5 MR. MCATEE: Correct, Your Honor.

6 THE COURT: So, why is it that you can't identify
7 where that came from? I keep going back to my idea about
8 the way this happened. In real time, somebody decided how
9 to calculate that number based on something. So, why is
10 that? So, either each trader had a log, or each trader had
11 a book, or something. There's ... it just, to me, just
12 seems logical that that is something that exists that you
13 should be able to specifically identify for them, by desk or
14 by name, or just by some stratification.

15 MR. MCATEE: Your Honor, what I would say is that
16 I agree with you, it exists. We, ourselves, are in the
17 process of identifying all of that for all the products that
18 are at issue. We're not complete yet, but we're in the
19 process, we're not done and that's why I said I don't know
20 how long it's going to take, but I can promise them that we
21 will provide that kind of backup -- the list of Bates
22 numbers, and everything, the quotes and the Bloomburgs and
23 the emails and everything. We can get that to them, I'm
24 just not sure how long it's going to take.

25 THE COURT: It is frustrating because that is,

1 that should have been done pursuant to the order. I mean
2 that's just a big -- that's a miss. That's just a big miss.

3 MR. MCATEE: Well, pursuant to the order, we did
4 provide all the documents. Those have all been produced.
5 It's just a matter of now compiling it in a list of Bates
6 numbers is what I'm talking about, and that's what we're
7 committing to do. I just need a little more time with my
8 team to know how long.

9 THE COURT: This needs to be the last go round
10 though. I mean we have this record now and it, now is, in
11 my mind, crystal clear that that needs to be done. So, when
12 you get back --

13 MR. MCATEE: End of day Friday, yes, Your Honor.

14 THE COURT: That's the best I can do, Ms.
15 Cafferata. I can't -- I don't have a time machine or a
16 freeze frame. I understand your frustration and I apologize
17 for my confusion, but I thought that that had been done. If
18 you want to prioritize among deponents as a way of not
19 losing ground and time, that's certainly something I think
20 that you could do. If you know that you are getting to some
21 names later than other names, then I don't know if that --

22 MR. MCATEE: Yes, Your Honor, and I will commit to
23 work with them. If we have some deponents coming up, or
24 this issue affects that, I'll frontload that so that they
25 don't have to redo the deposition a second time.

1 THE COURT: That's what I mean.

2 MR. MCATEE: No problem.

3 MS. CAFFERATA: Okay. But at some point, it
4 should be Credit Suisse and not Lehman that has to shoulder
5 the burden of Credit Suisse's failures. I mean we are now
6 jammed in putting on what is a very complex case, with
7 thousands of trades, because for whatever reason they didn't
8 think we deserved these figures and these numbers and this
9 support. This is something that should have been in the DQ.
10 It's, you don't hand over a bill for a billion dollars and
11 say, "We just think you should give it to us." So, at some
12 point there should just be a cutoff date and if they can't--
13 if they don't have the resources to pull it together, then
14 that's kind of their problem. But we've spent thousands of
15 hours trying to sift through all their stuff with no
16 explanation of, you know, oh, by the way, a bunch of those
17 files were just irrelevant. We've wasted tons of money --

18 THE COURT: I agree.

19 MS. CAFFERATA: -- and so this is a recipe for
20 wasting more money. And at some point, there should just be
21 a cutoff. And I bet they comply with it. I bet they do.

22 THE COURT: I agree. I'm seeing a new person
23 every time we have one of these. I have ... I am cautiously
24 optimistic that we're going to get the finish line now,
25 because I agree with you, we need to be done. It's been

1 troubling. I think Credit Suisse now has heightened
2 urgency. Stakes are very high.

3 MR. MCATEE: I agree, Your Honor.

4 THE COURT: The stakes are very high. There is a
5 level of --

6 MR. MCATEE: And there is, Your Honor. We've
7 added people, both at Cravath and inhouse and --

8 THE COURT: I mean, I've said it out loud before,
9 is that to the extent that there was ever a thought that
10 this would be easy because Credit Suisse was the last big
11 bank counterparty standing. That's not the case. And it's
12 alarming that 10 years out you're in the state that you're
13 in. So, I think the bottom line is you got to fix it, you
14 got to fix it really quickly or there are, you know, I'll
15 entertain appropriate motions for consequences. So, get
16 back to Ms. Cafferata by the end of the day on Friday. And
17 if you're unsatisfied with the timeframe, which I expect to
18 be very aggressive, I'll be here next week, not on Monday,
19 but I'll be here next week.

20 MR. MCATEE: Yes, Your Honor.

21 THE COURT: All right.

22 MS. CAFFERATA: Thank you, Your Honor.

23 THE COURT: Okay, is that it?

24 MS. CAFFERATA: So, we have one topic that we can
25 agree to as far as the scope, and that is topic D5,

1 identification of documents reflecting the trades executed
2 between September 15, 2008 and the present date, with the
3 purpose of managing, hedging or replacing Credit Suisse's
4 derivatives-related risk resulting from the termination of
5 the terminated Lehman trades, including the dates and times
6 and prices or levels at which any such trades were executed,
7 and the organization, purpose and function of the identified
8 documents, including the sources of the information
9 contained therein.

10 THE COURT: Okay, great. So, that resolves the
11 last paragraph, the issue that was raised in the January 8th
12 letter.

13 MS. CAFFERATA: Correct.

14 MR. MCATEE: Your Honor, the only caveat to that
15 is -- and I told counsel this when we were conferring -- she
16 used the term, "The present date," and what I said was that
17 although we believed that there was hedging activities after
18 the end of 2008, we were not going to argue that at trial,
19 so, we're not going to restore our databases all the way out
20 to the --

21 THE COURT: Yes, well, that was point of our
22 previous discussion. Is that we --

23 MR. MCATEE: Yes, Your Honor. But we will be
24 prepared to meet that topic through the end of 2008.

25 MS. CAFFERATA: And they agree that they will be

1 precluded from any evidence to contrary.

2 THE COURT: Precluded from arguing that you were
3 managing the risk beyond that date, yes?

4 MR. MCATEE: Yes, Your Honor. Even though we
5 believe it happened, we're not going to argue it at trial.

6 THE COURT: That's what I'm saying.

7 MR. MCATEE: Yes, Your Honor.

8 THE COURT: Okay, all right. Thank you very much.
9 I need to release you folks so that you can eat. Thank you
10 very much for staying here and working towards this. And I
11 hope you take this right way, but I hope not to hear from
12 you early next week, all right. Thank you.

13 MR. MCATEE: Thank you, Your Honor.

14 MS. CAFFERATA: Thank you, Your Honor.

15 THE COURT: Keep Miss Eisen posted about the
16 estimation stipulation. Thank you.

17 (Recess)

18 CLERK: All rise.

19 THE COURT: All right. Welcome back. Judge
20 Smith, please have a seat. Mr. Cosenza, back to you.

21 MR. COSENZA: Yes, Your Honor.

22 Q I think we left off talking about Justice Carpinello's
23 report and the notice that was provided by the Trustees to
24 the certificate holders that you cited in your expert
25 report. In that notice, there's also a reference to Judge

1 Gonzalez's expert report. And you have not read or seen
2 Judge Gonzalez's expert report, correct?

3 A I have not.

4 Q And you have not read or seen Mr. Greenspan's expert
5 report that's referenced in that notice, correct?

6 A Correct.

7 Q And although you never reviewed the three expert
8 reports that were identified in that notice, you have no
9 doubt that the Trustees gave the October 2015 settlement
10 careful consideration, correct?

11 A I have no doubt they gave it careful consideration.

12 Q And that conclusion is based on what you believe is
13 common sense, correct?

14 A Yes.

15 Q And in connection with the Trustees' rejection of the
16 October 2015 settlement, you did not know whether the
17 Trustees considered potential liability from certificate
18 holders if they had accepted the settlement, correct?

19 A That's correct. I don't.

20 Q But you assumed that every Trustee had potential
21 liability considerations working in their minds when the
22 Trustees rejected the October 2015 settlement, correct?

23 A Well, I assumed that anyone who serves as a trustee in
24 a matter this economic significant has somewhere in his or
25 her mind the possibility of liability.

1 Q Okay. And you -- you appreciate that the real parties
2 and financial interests here are in the certificate holders,
3 correct?

4 A And I think that's right, yes.

5 Q So I just -- I just want you to assume that the
6 Trustees had previously told the Court that their claims
7 were worth \$12 billion in August 2014 and they were then
8 presented with a settlement for \$2.4 billion in October
9 2015. In your opinion, the Trustees' concern for potential
10 liability would be relevant in not accepting the October
11 2015 settlement, correct?

12 A I'm not sure I can answer that with a simple yes or no.

13 Q How would you answer it?

14 A I guess I'd answer by saying that it -- it might or
15 might not be relevant depending on what was going on. That
16 in general, as a proposition which there are exceptions, the
17 best way for a trustee to protect itself from liability is
18 by doing the right thing for its certificate holders.

19 Q And the fact that the -- if the Trustees had told the
20 Court that their claims were worth six times what the
21 purported settlement that was presented to them a year and a
22 half later, you don't think it has any relevance to whether
23 or not they accepted or rejected the October 2015
24 settlement?

25 A I don't know whether it has any relevance.

1 Q Can you turn to paragraph 20 of your amended report?

2 And you testified to this earlier today, but if you look at
3 the second sentence, you state that, "In my experience, it
4 is not uncommon for a litigant who justifiably believes that
5 he or she is much more likely to win" --

6 A Now what paragraph are you -- Oh, I'm sorry. I guess
7 I'm in the -- I'm in the --

8 Q The original?

9 A I'm in the original report. You want paragraph 20 of
10 the amended --

11 Q Yes.

12 A -- amended report?

13 Q And it's the second sentence --

14 A Okay.

15 Q -- Mr. Smith. And you state that, "In my experience,
16 it is not uncommon for a litigant who justifiably believes
17 that he or she is much more likely to win than lose a case
18 to accept a settlement of 50 percent or less of the amount
19 of claims." Do you see that?

20 A Yes.

21 Q And that 50 percent or less, what you described in your
22 report, that only applies to good cases, correct?

23 A I feel more comfortable giving that opinion in good
24 cases, yes.

25 Q Okay. And you're not talking about what you just

1 talking in your deposition about bad cases?

2 A That's right.

3 Q And the basis for this statement in your report, I
4 think, is you testified is both an overall impression but
5 also a number of specific examples from your experience as a
6 practitioner, correct?

7 A Yes. That's -- there's also an area between the
8 overall impressions and specific examples which are -- the
9 specific cases I can't remember, but I'm sure --

10 Q Okay.

11 A -- there are some.

12 Q So we're going to walk through the examples you gave in
13 your deposition. I don't know if you recall that or not,
14 but I think you, in this opinion, you were able to cite five
15 examples. I think one of them was talked about earlier.

16 And one of the examples you cited is a 1974
17 employment contract case where you represent an individual
18 who lost his job; is that correct?

19 A Yes.

20 Q And that case went to verdict for an amount of \$45,000,
21 correct?

22 A That was my -- (indiscernible) is my best recollection.

23 Q Sure.

24 A I have not checked it.

25 Q But it's your belief that if offered, your client would

1 have accepted a settlement offer in the low \$20,000 range,
2 correct?

3 A That sounds right. I don't remember exactly what I
4 said, but that -- that is consistent with my recollection.

5 Q All right. And the second example was a case in 1977.
6 It's an insurance case involving a Fidelity bond --

7 A Yes.

8 Q -- correct? And in that case you represented the
9 plaintiff, Fidelity Deposit Insurance Company, against
10 Midland Bank and Trust Company; is that correct?

11 A The plaintiff was Midland Bank and Trust Company. The
12 defendant was Fidelity Deposit Insurance Company.

13 Q And who did you represent?

14 A The plaintiff.

15 Q You represented the plaintiff. And that case was
16 ultimately decided non-jury in your client's favor, correct?

17 A Yes.

18 Q But it's your view that your client would have accepted
19 less than half to settle the case before the verdict came
20 in?

21 A It's more than my view. We said that to the judge.

22 Q Okay. And your third example, you believe that
23 sometime in the 1980s you represented an insurance company
24 and in that case you represented the defendant?

25 A Yeah. Yes. I'm not -- I'm not sure -- I'm not sure

1 that a litigation was actually brought. That may have been
2 a pre-litigation negotiation.

3 Q Sure. And in that case, the plaintiff had a good case
4 and was willing to accept half --

5 A Yes.

6 Q -- correct? And the fourth example you cited was a
7 case from 1991 in which you won a verdict of about \$3.5
8 million on an action for a brokerage fee?

9 A Yes.

10 Q But you believe that your client -- you represented the
11 plaintiff there -- would have settled for half that amount,
12 correct?

13 A Less than half.

14 Q Less than half. And the fifth example and the last
15 example was another case from 1991 in which you represented
16 former partners in an Iranian architecture firm seeking to
17 recover part of an award from the Hague Tribunal, correct?

18 A Correct.

19 Q And in that case your client settled for less than half
20 of the total claim and was delighted, correct?

21 A Yes.

22 Q And that's a full list of cases you cited, if you
23 recall, at your deposition, correct?

24 A Those were the ones that I was then able to recall and
25 I haven't recalled any more since.

1 Q Good. And all those cases are from over 25 years ago,
2 correct?

3 A That's right. It seems amazing, yes.

4 Q And none of those cases are RMBS cases?

5 A Right.

6 Q And none of those cases were bankruptcy cases, correct?

7 A That's right.

8 Q And none of those cases were seeking damages in the
9 range that are at issues in this case, correct?

10 A The damages and the amounts at issues in this case, no,
11 certainly not.

12 Q And there's no definitive way to prove or disprove your
13 theory that a plaintiff with a better than even chance to
14 win will normally take half or less than that in a
15 settlement, correct?

16 A If there's a definitive way, I do not know what it is.

17 Q And you have not performed any quantitative analysis in
18 support of your opinion regarding a plaintiff's willingness
19 to accept a settlement of 50 percent or less for a good
20 case, correct?

21 A That's correct.

22 Q And plaintiffs -- you just touched on this --
23 plaintiffs with bad cases, you put them in an entirely
24 different category, correct?

25 A I think that's fair, at least I -- I feel less

1 comfortable giving an -- yeah, plaintiffs with bad cases --
2 plaintiffs with bad cases who brought the cases already and
3 they have questionable judgments, that makes it harder to
4 evaluate.

5 Q Okay. And you don't know sitting here today whether
6 the Trustees' claim here is a good case or a bad case.

7 A I -- I do not know, although it's a lot of money to
8 offer for a bad case, but I do not know.

9 Q Okay. But you sitting here, you don't know?

10 A I do not. I have not reviewed and do not have an
11 opinion on the merits of the claim.

12 Q So let's turn to paragraph 17 of your amended report,
13 and this is your discussion of the institutional investors.

14 A I'm sorry. Let me get your binder. Paragraph 17?

15 Q Yeah. And -- and you do not have an opinion here as to
16 how close the interest of the institutional investors are
17 aligned with those of the trust, correct?

18 A Correct.

19 Q If you look at paragraph 19 of your amended report, and
20 I think it states -- you can start with the second sentence.
21 You state, "I am informed that the institutional investors
22 accepted the 2015 proposed settlement before the Trustees
23 completed a detailed loan-by-loan review of the loan files
24 that are at the heart of the covered claim." Do you see
25 that?

1 A Yes.

2 Q Other than that, you didn't have any knowledge about
3 what information the institutional investors had available
4 to them when they accepted the settlement in October of
5 2015, correct?

6 A It jumped. I don't remember knowing anything specific.

7 Q And --

8 A If there's something in particular that might refresh
9 my recollection. I don't think I know anything specific.

10 Q Okay. And are you aware, by the way, that the loan
11 level review that was done by the Trustees when that was
12 completed in this case?

13 A That it was never completed?

14 Q When it was completed?

15 A When it was completed? No, I may -- I may once have
16 known, but I do not remember.

17 Q And if the loan level review was not completed before
18 the Trustees rejected or did not accept the plan
19 administrator's settlement with the institutional investors,
20 would that impact your analysis?

21 A Well, it wouldn't change the opinion I've expressed,
22 but it's a relevant -- it's relevant, would mean that the
23 Trustees' information was to that extent also imperfect.

24 Q And just assume for current purposes that the loan
25 level review was not completed until the middle of 2016.

1 Would that have been a fact that you would have wanted to
2 have known in putting together your report?

3 A Well, I'm not sure I didn't know it. It would
4 certainly not alter the opinions I expressed. The -- the
5 deficiency of information and the identity of the actors are
6 two -- two separate facts. I think I assumed that -- I did
7 not assume that the Trustees had more information than the
8 institutional investors.

9 I simply give the opinion that the Trustees are
10 more likely to be perfectly aligned with the plaintiffs
11 because the trusts are the plaintiffs than the institutional
12 investors. The question of the information available is
13 sort of a separate subject, which I also discussed.

14 Q But you noted in your report that institutional
15 investors accepted the proposed settlement before the
16 Trustees completed a detailed loan-by-loan level review of
17 the loan files.

18 A Yes.

19 Q Yes. And assuming the Trustees had not completed their
20 loan level review and they had not accepted the settlement,
21 would that impact your analysis at all?

22 A Well, I think what I just said was that the -- I think
23 I have always assumed or certainly never assumed the
24 contrary that the level of information of both parties back
25 in 2015 was similar. I did not assume any difference in

1 information. I -- I have given two separate reasons for
2 attaching relatively little weight to the institutional
3 investors' decision.

4 One is that they had deficient information, and
5 the other is that their interests may not have been
6 perfectly aligned with the plaintiffs. Those are
7 independent reasons.

8 Q Okay. Talking about the first issue you raised about
9 the -- I guess the deficient information, assume that the
10 Trustees have not completed their loan level review before
11 they decided not to accept the settlement, would that have
12 been a fact you wanted to have known before you included
13 this in paragraph 19 of your amended expert report?

14 A I wouldn't have minded knowing it, but it's not
15 inconsistent with anything I assumed. I mean you're -- the
16 point I'm trying to make is that there are two separate
17 reasons why I -- I criticized Professor Fischel's reliance
18 on the institutional investors' behavior. One is that he
19 seems to pick their behavior and ignoring the Trustees, and
20 for that purpose, I'm perfectly happy to assume that the
21 level of information between the Trustees and the
22 institutional investors was identical. I never really
23 suggested otherwise.

24 Another reason is that the institutional investors
25 lacked perfect information. And I was not comparing it to

1 what the Trustees knew then. I was comparing it really
2 essentially to what your Judge Chapman knows or will know by
3 the time this trial is over.

4 Q And other than what's in paragraph 19 here, you did not
5 perform any research or investigation to determine what the
6 institutional investors knew or didn't know about the
7 potential value of their claim, correct?

8 A That's correct.

9 Q And at the time of your deposition, you did not know
10 who the institutional investors were, correct?

11 A That's correct.

12 Q All you knew when you issued your report was that in
13 October of 2015 the institutional investors accepted a deal
14 at \$2.4 billion, correct?

15 A Well, that's all I knew, that's maybe a sweeping
16 statement, but that was -- that's certainly the -- I -- I
17 knew -- I probably remembered better then than I do now
18 exactly what Professor Fischel had said about who the
19 institutional investors were and what they did. But
20 certainly, the central fact was that they -- that they
21 accepted the deal.

22 Q Now are you now aware that the institutional investors
23 include Goldman Sachs Asset Management, BlackRock, Aegon,
24 PIMCO, MetLife, Wamco? Are you now aware of that?

25 A Well, and I can now infer it from your asking the

1 question. And I inferred part of it from the questions that
2 I was asked at my deposition. Some of those names were
3 mentioned at my deposition.

4 Q And you agree that BlackRock is a sophisticated
5 financial institution that can make its own independent
6 financial judgments, correct?

7 A Yes.

8 Q And you agree the same to PIMCO well, correct?

9 A Yes.

10 Q And you agree the same thing about Goldman Sachs Asset
11 Management, correct?

12 A Yes.

13 Q Same question about Wamco?

14 A Yes.

15 Q Okay.

16 A Well, actually, I'm sorry. Tell me again who I -- who
17 I just said was --

18 Q Wamco. Wamco, Western Asset Management Company.

19 A I -- I -- I don't actually -- I should admit this. I
20 don't recognize the name.

21 Q That's --

22 A But if you --

23 Q They're --

24 A I -- I have a feeling that if they're people Fischel
25 calls institutional investors, they're pretty sophisticated.

1 Q Okay. And you are aware that the institutional
2 investors have experience valuing and resolving similar RMBS
3 claims, correct?

4 A I assume that to be correct.

5 Q And that does not impact your analysis here?

6 A It does not change my analysis.

7 Q Does it impact your analysis at all?

8 A I -- well, you're telling me now doesn't -- it doesn't
9 impact my analysis at all because it's something I would
10 have assumed.

11 Q Okay. And you're aware that the Trustees have relied
12 on the support of many of these same institutional investors
13 in accepting global RMBS settlements, correct?

14 A I'm not sure I was specifically aware of it. I'm not
15 at all surprised to hear it, and I may have been
16 specifically aware.

17 Q And, again, that doesn't impact your analysis?

18 A It does not.

19 Q Okay. And here it's your opinion that these
20 institutional investors are large bureaucratic institutions
21 and might be even more cautious than an individual when it
22 comes to reaching a settlement, correct?

23 A Well, it did. That's a thought that occurred to me at
24 my deposition, and I think it -- I do think it makes a
25 certain amount of sense that if you're going to make a --

1 yeah, that if you are -- prima facie the question is who
2 would be more cautious, an institutional investor with its
3 client's money and a person or entity with its own money.
4 It is my judgment the bureaucrats would generally be more
5 cautious.

6 Q And you don't think the RMBS Trustees here fall in the
7 category of large bureaucratic institutions?

8 A Well, they may. I did not suggest they didn't.

9 Q Okay. And you are not offering an opinion as to
10 whether the settlements that Professor Fischel examined are,
11 in fact, comparable or not comparable to this case, correct?

12 A I am not offering an opinion as to whether they are
13 comparable. I am offering the opinion that he does not show
14 that they are comparable in a meaningful way.

15 Q But they may be comparable in your view? You just
16 don't agree with the analysis?

17 A I -- they may be. They may resemble this case as
18 substantially more than is at all clear from his report, but
19 that's pure speculation.

20 Q I'm going to put up TRX Exhibit 778, and I just want to
21 look at the five settlements that Professor Fischel
22 identifies as comparable: Countrywide, JP Morgan, Citi
23 Group, ResCap, and Washington Mutual. Have you seen this
24 exhibit before, Mr. Smith?

25 A I've certainly seen something that looks like it.

1 Q And do you see in column E, there's a recovery ratio
2 used by Professor Fischel to compare these different RMBS
3 settlements?

4 A In the last two columns there?

5 Q Yes.

6 A Yes.

7 Q And do you see the recovery ratio here at the \$2.4
8 billion level? Is that the high end of the recovery ratios
9 in looking at these other settlements?

10 A Well, I remember that from what he said. It would take
11 me a minute to find it on this chart.

12 Q I just -- to assist you --

13 A Yeah. Yes. Okay. I see the point, yes.

14 Q And you're not disputing these calculations?

15 A I'm sorry.

16 Q And you're not disputing the underlying calculations?

17 A No. I have no doubt that he did the math correctly.

18 Q Okay. And you're aware that the same Trustees that are
19 here today supported the settlements that are referred to on
20 this chart, these other global RMBS settlements set forth in
21 TRX778 at the recovery ratios identified here?

22 A I'm not surprised. I don't actually know that all
23 these Trustees were involved in all these settlements, but
24 it does not surprise me. Of course, the -- there were
25 Trustees of different trusts apart from -- apart from other

1 things.

2 Q But -- that's correct. But you're aware that some of
3 the same -- are you not aware or are you --

4 A I -- I'm sure that many, if not all, of the same
5 Trustees were involved.

6 Q And are you aware that the same Trustees relied on
7 Professor Fischel's opinion in several of these other global
8 RMBS settlements?

9 A Yes.

10 Q And are you aware that these recovery ratios listed on
11 Professor Fischel's exhibit here are frequently used by
12 financial analysts in analyzing and comparing global RMBS
13 settlements?

14 A I believe that Professor Fischel may have said that or
15 maybe I just assumed it. But I'm not surprised to hear it.

16 Q You're not surprised to hear that. So you're aware
17 that these financial analysts use the same method that
18 Professor Fischel used to analyze the settlements?

19 A Which financial analysts are you talking about?

20 Q Okay. Let's -- let's refer you to Tab 6, 7, and 8 of
21 your binder.

22 MR. COSENZA: And for the record, they're Plan
23 Administrator Exhibits 42 -- sorry -- 432, Plan
24 Administrator Exhibit 433, Plan Administrator Exhibit 434.

25 Q We'll look at the first one, and that's a report from

1 Credit Suisse. And I guess my first question for you is
2 have you seen this report before?

3 A Not to my recollection.

4 Q Same question on Exhibit 433, have you seen this report
5 from Deutsche Bank regarding the outlook in MBS in
6 securitized products?

7 A Not to my recollection.

8 Q And have you looked at Exhibit -- Plan Administrator
9 Exhibit 434 from Morgan Stanley talking about the
10 implications of the Citi Group settlement?

11 A I do not remember seeing it.

12 Q So you have not seen any of these?

13 A Not to my recollection.

14 Q Would it impact your analysis and your opinion that
15 market participants used these settlements as benchmarks in
16 use of the recovery ratios in their analysis?

17 A You asked two questions, if they used these settlements
18 as benchmarks --

19 Q Yes.

20 A -- or as recovery ratios? Which is it?

21 Q The recovery ratios that reflect on these settlements?

22 A That they used recovery ratios would not impact my
23 opinion at all.

24 Q It would not?

25 A No.

1 Q And the fact that the settlements Professor Fischel
2 offers as comparable all involve the same macroeconomic
3 factors, the financial crisis, that does not sway your
4 opinion as to whether or not these settlements are
5 comparable?

6 A It does not.

7 Q But you agree that the macroeconomic context --

8 A Actually, as you mentioned earlier, I have not
9 specifically expressed an opinion whether they are
10 comparable. I -- I have expressed the opinion that
11 Professor Fischel does not show that they are comparable.

12 Q Okay. But you agree that the macroeconomic context in
13 which these claims occurred is a relevant factor to
14 determine whether or not the claims and settlements are
15 comparable, correct?

16 A In the sense that if they had occurred in a different
17 macroeconomic environment, that might be distinguishing
18 factor. Frankly, I haven't thought about that.

19 Q Okay. I'd just refer you to Tab 1 of your -- this is
20 your deposition transcript. Page 95, lines 21 over to page
21 96, line 2. I'll give you a minute to -- to get there, Mr.
22 Smith.

23 A I'm sorry. Page?

24 Q Page 95, line 21.

25 A 95, line 21. Okay.

1 Q And you were asked, "Do you think the macroeconomic
2 context in which the claims occurred is a relevant factor to
3 look at to determine whether or not the claims are
4 comparable and the settlements are comparable?" And you
5 answered, "I would think so, yes."

6 A Yes.

7 Q Were you asked that question and you gave that answer?

8 A Yes.

9 Q Thank you. And just to be clear, you're not saying
10 that these settlements that Professor Fischel relied on
11 could never be used as comparables in an analysis, correct?

12 A I'm not saying that, no.

13 Q Yes. You choose not -- you choose to not find the
14 weight that Professor Fischel did his analysis to be
15 enlightening for your opinion, correct? In your opinion.

16 A That's -- that's -- I would say I did not find his
17 analysis to be enlightening, to be -- to be of great value.

18 Q Now let's turn to paragraph 26 of your report and look
19 at the first sentence.

20 A I see it.

21 Q Okay. And it states that the -- that you understand
22 from Trustees' counsel they have no similar reluctance to
23 address this question and that Trustees expect to show at
24 the hearing. We're not conceding that the issue is
25 relevant, that the claims of the Trustees are much more

1 likely to succeed than those of the plaintiffs in the cases
2 Professor Fischel describes as comparable. Do you see that?

3 A I do.

4 Q And that's -- but that's not your opinion, correct?

5 A No, that's -- that's -- that is my report of what I was
6 informed by the Trustees' counsel.

7 Q And that's just the position that Holwell Shuster and
8 the Trustees provided to you, correct? That's the --

9 A Yes.

10 Q -- position that was reported --

11 A Yes.

12 Q -- to you?

13 A Yes.

14 Q You just simply reflected that in paragraph 26 of your
15 report?

16 A Yes.

17 Q And, again, you did not undertake any analysis to
18 determine whether the Trustee's claims here are, in fact,
19 good or bad, correct?

20 A Correct.

21 Q And for the purposes of your opinion, it does not
22 matter whether the Trustee's claims are great or horrible,
23 correct?

24 A Oh, I wouldn't say that. No. If you -- if I -- if
25 either fact were demonstrated to me, that would make a

1 difference to my opinion and neither one has.

2 Q So I'm going to refer you to page 99 of your
3 deposition, lines 11 through 22. I'll give you a minute to
4 get there.

5 A 11 to 22.

6 Q Yeah. And you were asked, "So for purposes of your
7 opinion in this case, it doesn't matter whether the
8 Trustees' claims are great or whether they are horrible; is
9 that right?" Skip the objection. Answer, "I think that's
10 in a sense that's true. Yeah, they could be. They could be
11 great or they could be horrible. In either case Professor
12 Fischel's report would have very little value in figuring
13 out which one was true."

14 Did you give that answer to that question?

15 A Yes. Yes, I did. It's a better answer than I gave
16 here today, yes.

17 Q Okay.

18 MR. COSENZA: That's all I have, Your Honor.

19 Thank you.

20 THE COURT: Okay. Thank you, Mr. Cosenza. Any
21 redirect?

22 MR. DEMAY: No, Your Honor.

23 THE COURT: All right. Thank you, Mr. DeMay.

24 Judge Smith, thank you very much.

25 MR. SMITH: Thank you.

1 THE COURT: Delightful to see you. Enjoy the rest
2 of your evening.

3 MR. SMITH: Thank you very much.

4 THE COURT: Okay. So that's all we have for
5 today, yes?

6 MR. DEMAY: That's correct, Your Honor.

7 THE COURT: Okay. And you're going to be talking
8 to each other about coming attractions, but for tomorrow's
9 purposes, we're reconvening at 10:00. Yes? Okay. And no
10 one will be coming in after or before you, so you don't have
11 to entirely clean up. Okay? Thank you very much.

12 MR. COSENZA: Thank you, Your Honor.

13 MR. DEMAY: Thank you.

14 THE COURT: Have a good evening. Thank you.

15 (Whereupon these proceedings were concluded at 3:58 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

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